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No:

In the
Supreme Court of the United States

EDDIE S. RODRIGUEZ-BERRIOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Erick Morales-Perez*
Puerto Rico Bar # 203211
P.O. Box 10409
San Juan, PR 00922
(787) 605-8000 Office

**Counsel for Petitioner*

QUESTIONS PRESENTED FOR REVIEW

I. In a case where a defendant is charged with violating Title 18 U.S.C. § 2119(3), the federal carjacking statute that results in the death of the victim, does the actual death of the victim have to occur contemporaneously with the carjacking or is the statute to be interpreted to allow the offense to be measured during the prolonged carjacking offense.

> a. If the statute is to interpreted that the death must occurs contemporaneously with the charged offense, are elements of the charged offense met when the government fails to establish that the defendant actually committed the death of the victim while violating the federal carjacking statute.

II. Is a defendant's Sixth Amendment right to present a defense violated when the court refuses to allow him to present his defense via expert testimony on the flaws of eyewitness identification, when there are no actual eye witnesses to the charged offense and the only eye witness that last saw the defendant with the victim testified over four years after the incident occurred and changed her identification testimony several years later.

III. Is a defendant's Sixth Amendment Confrontation Clause violated when the district court allows the government to introduce evidence of past domestic violence and then curtails the defendant's attempts to counter those allegations.

PARTIES TO THE PROCEEDINGS
IN THE COURT BELOW

In addition to the parties named in the caption of the case, the following individuals were parties to the case. The United States Court of Appeal for the First Circuit, the Honorable Judge Juan M. Perez-Jimenez, Lidia Lizarribar-Buxo, Esquire, Tomas Lincoln San Juan, Esquire, Richard Strafer, Esquire, Vijay Shanker, United States Department of Justice, Rosa Emilia Rodriguez-Velez, United States Attorney and Nelson Perez-Sosa, Assistant United States Attorney

None of the parties is a company, corporation, or subsidiary of any company or corporation.

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ON PETITION FOR WRIT OF CERTIORARI
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FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Eddie S. Rodriguez-Berrios, the Petitioner herein, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the First Circuit, whose judgment is herein sought to be reviewed, is a published opinion *United States of America, v. Eddie S. Rodriguez-Berrios,* 573 F.3d 55 (1st Cir. 2009) is dated June 29, 2009 and is reprinted as Appendix A to this Petition.

A timely petition for rehearing and suggestion for rehearing *en banc* sought under *United States of America, v. Eddie S. Rodriguez-Berrios,* 573 F.3d 55 (1st Cir. 2009), was denied on September 15, 2009 and is reprinted as Appendix B to this Petition.

STATEMENT OF JURISDICTION

The Judgment of the Court of Appeals was entered on September 15, 2009.

The Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND RULES INVOLVED

The Sixth Amendment of the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have

> compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Id. U.S. Const. amend. VI.

Title 18 U.S.C. § 2119 provides in pertinent part:

> Motor vehicles
>
> Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall--
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury (as defined in section 1365 of this title, including any conduct that, if the conduct occurred in the special maritime and territorial jurisdiction of the United States, would violate section 2241 or 2242 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

Id. Title 18 U.S.C. § 2119

The Federal Rules of Evidence, Rule 801 provides in pertinent part:

Rule 801 - Definitions

The following definitions apply under this article:

> (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
>
> (b) Declarant. A "declarant" is a person who makes a statement.
>
> (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
>
> (d) Statements which are not hearsay. A statement is not hearsay if--

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

Id. Fed. R. Evid. Rule 801

STATEMENT OF THE CASE

A. Course of Proceedings in the District Court

1. The Indictment

On April 15, 1999, Yesenia Ortiz-Acosta ("Yesenia") disappeared and likewise her auto also disappeared. The vehicle in which she was last seen, was discovered severely burned. Her body has never been found. Suspicion for her disappearance immediately fell on Yesenia's ex-husband Petitioner a police officer with Puerto Rico Police Department. The case generated enormous publicity in Puerto Rico. Yesenia's father, Anibal Ortiz Rodriguez

("Anibal"), had worked for the Puerto Rico Police Department for 31 years. His aunt, Pilar Rodriguez ("Pilar"), was the Mayor of Patillas, Puerto Rico. Not surprisingly, as the district court later found, "the press ... covered almost every stage of this case."

On February 24, 2004, Petitioner and two co-defendants, Mario Jose Hernandez and Jose Luis Roman, were charged in a three-count indictment. Count one charged the three defendants with conspiring, between January and April 1999, to commit a carjacking that "resulted" in the death of Petitioner's ex-wife in violation of 18 U.S.C. § 371 and 2119(3). Count two charged the same three defendants with committing the carjacking on April 15, 1999, in violation of § 2119(3). And, Count three charged them with using "fire" to commit the carjacking in violation of 18 U.S.C. § 844(h)(l) and (2).

The indictment, repeated the allegations in the media from the alleged eyewitness that the three defendants sexually assaulted Yesenia before forcing her into the trunk of Petitioner's car. The witness then allegedly saw the defendants take a gallon of gasoline and set fire to Yesenia's car. The return of the indictment drew additional publicity. On March 2, 2004, Magistrate Judge Aida M. Delgado Colon convened a detention hearing for the three defendants at which the government reiterated that an eyewitness claimed to have seen each of the defendants sexually assault Yesenia before stuffing her into the trunk of Petitioner's car.

The government also claimed to have hair samples that corroborated the witness. The media duly reported these sensational allegations. On April 14, 2004, the government returned a superseding indictment containing the same charges and allegations.

By 2006, however, the government's purported eyewitness, Claudio, had given different stories and was deemed unreliable. In addition, further DNA testing revealed that the initial hair comparisons were incorrect and additional DNA testing refuted the government's claims. In fact, as the district court later found, "none" of the samples "matched the DNA of the victim or the defendant." Since the government no longer had any evidence against Petitioner's co-defendants, the government moved to dismiss all charges against them and the court immediately granted the motion. Counts one and three against Petitioner were also dismissed and the allegations about the sexual assault and burning of the car were redacted from Count 2.

2. The Exclusion of Petitioner's Expert Witness

After being notified by the government that it intended to introduce testimony from two eyewitnesses to the alleged carjacking - Diana Colon Laboy and Sidia Lebron Gonzalez, Petitioner moved for permission to introduce expert testimony on the characteristics of memory and perception that can make eyewitness identifications unreliable. At the district court's request, Petitioner filed a proffer of the anticipated testimony and qualifications of Geoffrey R. Loftus, PhD.

After reviewing the proffer, the district court denied the request and excluded the expert testimony. While the district court agreed that Petitioner was "not completely off the mark" in arguing that the case was still largely based on the eyewitness testimony, the court reasoned that the existence of other evidence, including some incriminating statements and evidence of "domestic violence" by Petitioner against Yesenia, lessened the need for the testimony.

The court then ruled that the proffered testimony was "not relevant," would not assist the jury and was likely to "create a substantial danger of undue prejudice." At the same time the court found the testimony to be irrelevant and unhelpful, the district court also found that Dr. Loftus' report and qualifications were "certainly impressive" and that "lay jurors may not have the best possible knowledge of the organic and behavioral mechanism of perception and memory."

After reviewing discovery, Petitioner later moved the court to reconsider its order, pointing out in detail how the statements given by two witnesses evolved from being equivocal to certain about their identifications. For example, in a statement given to the FBI on April 30, 1999, Colon stated that she saw a man who "looked like" Petitioner arguing with Yesenia but that she "was unable to further explain the reason why she could not determine if the individual who was fighting with the female, was Petitioner."

A year later in testifying before the grand jury, Colon was suddenly certain about her identification and added details she had not previously told the FBI. However, a passenger in Colon's vehicle on the evening of the incident (April 15, 1999), Jeanette Denise Reyes Guzman, gave sworn statements indicating that Colon did ***not*** identify Petitioner that night. The district court, however, refused to reconsider its ruling.

3. The Hearsay Evidence

Prior to trial, Petitioner also moved to exclude evidence concerning a domestic violence complaint Yesenia had

filed against Petitioner prior to her disappearance.[1] Petitioner argued that the admission of Yesenia's allegations in the complaint would violate his rights under the Confrontation Clause. In addition, he argued that the complaint was particularly unreliable because it was filed "with the apparent intervention" of a district attorney [Serrano], who was romantically involved with Yesenia and with whom she was apparently having an extramarital affair at the time. Moreover, the complaint was filed shortly after Petitioner had exposed the affair to Yesenia's parents.

The government filed a response to the motion, arguing that the court should find that Petitioner no longer had rights under the Confrontation Clause and that the hearsay was admissible pursuant to Fed. R. Evid. 804(b)(6), incorporating the so-called "forfeiture by wrongdoing" doctrine. Alternatively, the government argued that the statements were admissible as "excited utterances" or as expressions of Yesenia's "state of mind" under Fed. R. Evid. 803(3). The district court, however, declined to rule on these issues until trial.

Petitioner countered that the forfeiture by wrongdoing doctrine required the government to prove its applicability by a preponderance of the evidence before introducing the statements and that the return of the indictment in this case could not be used as a substitute for such proof because it was obtained through false testimony and discredited DNA evidence. When the trial commenced, the district court indicated that it needed to hear testimony before ruling on whether to admit the hearsay. Petitioner proceeded to trial between September 7-13, 2006. On September 13, 2006,

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[1] The Protective Order was requested on February 4, 1999 and dismissed five days later on February 9, 1999.

Petitioner was convicted on Count 2 and subsequently sentenced to life imprisonment.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT HAS INTERPRETED A FEDERAL STATUTES IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

Supreme Court Rule 10 provides in relevant part as follows:

Rule 10
CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

> (1) A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> > (a)When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such

> a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b)When a ... United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court.... *Id.*

Id. Supreme Court Rule 10.1(a), (c)

QUESTIONS PRESENTED

IS THE SIXTH AMENDMENT CONFRONTATION CLAUSE VIOLATED WHEN THE DISTRICT COURT ALLOWS THE GOVERNMENT TO INTRODUCE EVIDENCE OF PAST DOMESTIC VIOLENCE AND THEN CURTAILS PETITIONER'S ATTEMPTS TO COUNTER THESE ALLEGATIONS

A. The Domestic Violence Testimony

The government spent a significant part of its case portraying Petitioner as a serial wife-beater. This evidence included:

- Testimony from Rosa Rodriguez that, in December 1998, Yesenia told her that the bruise on her arm was caused by "her husband" who had "hit her" and that she was "afraid, afraid of him."

- Testimony, again from Rosa Rodriguez, that after Petitioner passed them in the courthouse hallway and "nudged" Yesenia "with his elbow," Rodriguez spoke with Yesenia in her office and she became "very nervous, and she started crying. I mean she lost control."

- The testimony from Yesenia's mother, Acosta, that after being confronted with evidence of her adultery, Yesenia accused Petitioner of following her "everywhere, that she can't have lunch at peace" and "that she had seen him in her rear view mirror."

- Additional testimony from Acosta that Yesenia claimed he was "an abuser" and "he would throw the baby at her from far away, that she was afraid that the baby might drop."

- Testimony and evidence that Yesenia obtained a protective order from a local judge against Petitioner.

- Yessica Dones' testimony that she witnessed Petitioner hit Yesenia in 1995 - four years before her disappearance.

The district court waited until trial to rule on the admissibility of this evidence and ultimately permitted the hearsay testimony as either "excited utterances" under Rule 803(2) or as statements of Yesenia's "then existing state of mind" under Rule 803(3). While summarily admitting the evidence under these rules, the district court ignored Petitioner' objections under Fed. R. Evid. 403 and the Confrontation Clause.

The Confrontation Clause imposes three basic conditions on testimony offered against an accused: First, it must be given in the presence of the accused. *Coy v. Iowa,* 487 U.S. 1012, 1016 (1988). Second, the accused must have an opportunity to cross-examine the witness. *Crawford v. Washington,* 541 U.S. 36, 53-54 (2004). Third, the witness must give the testimony at trial unless she is unable to testify there. *Id.*

Despite providing the above generic definition, the Crawford Court "lef[t] for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68, 124 S.Ct. 1354. It did provide a non-comprehensive list of testimony that would be considered testimonial: testimony at a preliminary hearing, testimony in front of a grand jury

or at a trial, and testimony that results from police interrogation. *Id.* 124 S.Ct. 1354

This Court in *Davis v. Washington*, 126 S.Ct. 2266 (2006) clarified that that the Sixth Amendment confrontation clause ruling presented in the *Crawford* decision applies to statements made to law enforcement officers via an affidavit prepared at a scene. In essence, the *Davis* decision has extended the *Crawford* opinion not only to confrontational statements, but also to tangible items, such as a sworn statement that can be authenticated by law enforcement officer's should the witness become "unavailable" before trial.

In *Hammon v. Indiana*, No. 05-5705, police responded late on the night of February 26, 2003, to a "reported domestic disturbance" at the home of Hershel and Amy Hammon. *Id.* 829 N.E.2d 444, 446 (Ind. 2005). They found Amy alone on the front porch, appearing "somewhat frightened," but she told them that "nothing was the matter," *id.*, at 446, 447. She gave them permission to enter the house, where an officer saw "a gas heating unit in the corner of the living room" that had "flames coming out of the ... partial glass front. There were pieces of glass on the ground in front of it and there was flame emitting from the front of the heating unit." *Id.* After hearing Amy's account, the officers "had her fill out and sign a battery affidavit." *Id.*, at 18. Amy handwrote the following: "Broke our furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter." *Id.* at 2.

The State charged Hershel with domestic battery and with violating his probation. Amy was subpoenaed, but she did not appear at his subsequent bench trial. The State called the officer who had questioned Amy, and asked him

to recount what Amy told him and to authenticate the affidavit. Hershel's counsel repeatedly objected to the admission of this evidence. The trial judge found Hershel guilty on both charges, *Id.*, at 40, and the Indiana Court of Appeals affirmed in relevant part, 809 N.E.2d 945 (2004).

The Supreme Court in *Davis*, determined otherwise. The Supreme Court held that it is entirely clear from the circumstances that the interrogation was part of an investigation into possible ***criminal past conduct***, as indeed, the testifying officer expressly acknowledged. The statement in the *Davis* opinion, was a tangible item that was used to introduce evidence against the accused without the safeguards of the confrontation clause. The confrontation clause is violated when the accused is not able to confront the party who, as in *Davis* wrote the affidavit, or in Petitioner's case allegedly made statements to a third party that was later unavailable for trial and the information was introduced via other sources; namely government witnesses. "The text of the Confrontation Clause reflects this focus [on testimonial hearsay]. It applies to 'witnesses' against the accused-in other words, those who 'bear testimony.'"[2] It is evident that the purpose of the introducing the protective order, was to "bear indirect testimony" against Petitioner.

Since this Court has left the possibility that other situations may arise that may entail the application of the confrontation clause, the Court in *Johnson v. State*, 929 So.2d 4 (Fla. App. 2 Dist.2005)[3] extended the *Crawford*

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[2] 1 N. Webster, An American Dictionary of the English Language (1828). 'Testimony,' in turn, is typically 'a solemn declaration or affirmation made for the purpose of establishing or proving some fact.' *Ibid*

position rightfully to the admittance of an FDLE Laboratory Report that was submitted to establish the "result" of a charged offense at trial. In that case, the FDLE Report was admitted at trial to establish the results of a lab report on whether a substance was in fact a narcotic. There was no testimony from the laboratory technician on the results of the test. The court merely accepted the lab results into evidence against the accused. The state appellate court determined that in light of *Davis*, the FDLE Lab Report would provide indirect accusatory statement thus being confrontational hearsay. In remanding the State concluded the FDLE report is testimonial and subject to the confrontation clause in light of *Crawford* and *Davis*.

Accordingly, the sole purpose of presenting the protective order was to establish "past events." It is obviously a substitute for live testimony since they do precisely what a witness does on direct examination, the protective order provides direct testimony of a "past offense." The District Court's blanket admission of the hearsay testimony and the protective order are a clear violation of Petitioner's Sixth Amendment constitutional rights and are in direct conflict with this Court's decision in *Crawford v. Washington*, 124 S. Ct. 1353 (2004) and in *Davis v. Washington*, 126 S.Ct. 2266 (2006).

Furthermore none of the hearsay statements - especially the domestic violence complaint and protective order - qualified as "excited utterances" since none (with the possible exception of the statements allegedly made to Acosta immediately after the claimed "choking" incident)

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[3] Although this is a State case and has no direct authority on this Court, the case is cited to show how the Supreme Court's *Crawford* decision extends to tangible items can provide indirect accusatory statements.

were made contemporaneously with any conduct by Petitioner. Nor were they admissible under the "state of mind" exception, since the statements went far beyond mere expressions of emotion (such as "fear") by accusing Petitioner of being responsible for that emotion. However, in order to admit a statement under Fed. R. Evid. 803(3), "declarant's statement of mind must be relevant to some issue in the case." *United States v. Lizon-Barias*, No. 06-14785 (11 Cir. Nov. 1, 2007) (unpublished), 2007 US. App. LEXIS 25688, at *7 (citation omitted).

Given that Yesenia's state of mind months before her disappearance was "not at issue," the testimony was irrelevant and should have never been introduced since is runs afoul of this court's decision in *Crawford* and *Davis*. In any event, "the state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why [s]he held the particular state of mind, or what [s]he might have believed that would have induced the statement." *United States v. Samaniego*, 345 F.3d 1280, 1282 (11th Cir. 2003) (citation omitted). The admittance of the statements was not a Rule 803 issue, but a Sixth Amendment confrontational issue.

Therefore, the most Acosta and Rodriguez should have been allowed to say was that Yesenia was "afraid." They should have been barred from giving the prejudicial explanations for that state of mind, *i.e.*, that Petitioner was responsible for her fear. See, *Samaniego*, 345 F.3d at 1283. Even if the evidence qualified for admission under Rules 803(2), 803(3) and/or 404(b), its marginal relevance was far exceeded by the danger of unfair prejudice. The evidence was of minimal relevance (especially the episode in 1995, four years before Yesenia's disappearance).

Petitioner's principle defense was that Colon misidentified him as the man she saw struggling with

Yesenia and that he was elsewhere at the time of her disappearance. The evidence of past domestic violence was simply used to portray Petitioner as a bad man, a wife-beater. The claims of domestic violence, however, were not relevant to whether Colon accurately identified him or whether he had an alibi for his whereabouts on April 15, 1999.

The principle purpose of the evidence was simply to prejudice the jury against him. As the court recognized in *United States v. Hands,* 184 F.3d 1322, 1328 (11th Cir. 1999), "types of extrinsic acts are particularly 'likely to incite a jury to an irrational decision,'" and "few would doubt that violent spousal abuse falls into this category." In Hands, the court held that the introduction of "domestic violence" evidence was not only improper but "not harmless" *Hands,* 184 F3d. at 1329:

> "The public stigma attached to a husband who beats his wife is significant. The inflammatory nature of such a characterization is arguably more substantial than the purchase of [drugs]"

The other alleged hearsay statements Yesenia allegedly made to Rodriguez and Acosta, although arguably not testimonial, nonetheless violated the Confrontation Clause under *Ohio v. Roberts,* 448 U.S. 56, 66 (1980). Until 2004, the admission of hearsay only satisfied the Confrontation Clause if it was introduced through a "firmly rooted" hearsay exception or the hearsay itself bore "particularized guarantees of trustworthiness." See *Ohio v. Roberts,* 448 U.S. 56, 66 (1980). In 2004, this Court changed the focus, at least for certain forms of hearsay, from the "reliability" of the hearsay to whether the hearsay was "testimonial." *Crawford,* 541 U.S. at 59. Crawford, however, did not

address whether non-testimonial forms hearsay would still be governed by *Roberts*. In *Horton v. Allen*, 370 F.3d 75, 84(1st Cir. 2004), the Court held that *Crawford* did not alter the law with respect to non-testimonial hearsay. Other Circuit's agreed with this analysis,[4] at least until June 2006, when this Court decided *Davis*. In applying *Crawford* to 911 calls, *Davis* suggested that the Confrontation Clause applied only to testimonial hearsay. *Davis*, 126 S.Ct. at 2274. However, in the wake of *Davis*, the circuits have split on whether the Confrontation Clause still requires courts to examine at least some varieties of non-testimonial hearsay under *Roberts*.

The Third, Sixth, Seventh and Tenth Circuits have continued to apply *Roberts* to non-testimonial hearsay,[5] while the Second and Fourth Circuits have not.[6] The Fifth

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[4] See, e.g., *United States v. Underwood*, 446 F.3d 1340, 1346 (11th Cir.), *cert denied*, 127 S.Ct. 225 (2006); *Summers v. Dretke*, 431 F.3d 861, 877 (5th Cir. 2005); *United States v. Hinton*, 423 F.3d 355, 358 n.1 (3rd Cir. 2005); *United State v. Brun*, 416 F.3d 703, 707 (8th Cir. 2005); *United States v. Franklin*, 415 F.3d 537, 546 (6th Cir. 2005); *United States v. Saget*, 377 F.3d 223, 227 (2nd Cir. 2004).

[5] *United States v. Thomas*, 453 F.3d 838, 844 & n. 2 (7th Cir. 2006); *Albrecht v. Horn*, 485 F.3d 103, 134 (3rd Cir. 2007); *United States v. Ramirez*, 479 F.3d 1229, 1247 (10th Cir. 2007); *United States v. Yongo*, No. 05-3795 (3rd Cir. Oct. 4, 2007) (unpublished), 2007 US, App. LEXIS 23393, at * 11-13; *United States V. Lin*, No. CR-01-20071-RMW (N.D. Cal. Jan. 5, 2007), 2007 U.S. LEXIS 3713, at *9 *Cf United States v. Ellis*, 460 F.3d 920 (7th Cir. 2006)(business records not subject to Confrontation Clause because business records "by their very nature were not testimonial").

[6] See *United States v. Jordan*, 509 F.3d 191 (4th Cir. 2007); *United States v. Williams*, 506 F.3d 151, 155-157 (2nd Cir. 2007); *United States v. Feliz*, 467 F.3d 227, 232 (2nd Cir. 2006). *But see United States v. Myton*, 224 Fed. Appx. 125, 129 (2nd Cir.)(finding a non-testimonial statement inadmissible under Roberts but holding the error harmless), *cert denied*, 128 S.Ct. 419 (2007).

and Eighth Circuits have not yet clarified their positions.[7] While the First Circuit has twice stated that "only" testimonial hearsay is subject to the Confrontation Clause, see *United States v. Earle,* 488 F.3d 537,542(1st Cir.), *cert. denied,* 128 S.Ct. 423 (2007), *United States v. Munoz-Franco,* 487 F.3d 25, 38 (1st Cir.), *cert. denied,* 128 S.Ct. 678 (2007), in both cases that language was only dicta because the defendants in *Earle* and *Munoz-Franco* did not raise any claim that *Roberts* still applied to non-testimonial forms of hearsay and neither decision discussed, nor even cited, *Horton* and *Roberts*.

Accordingly, the First Circuit in this case was bound by *Horton* since, at most, it's rationale may have been weakened but not directly overruled by the Supreme Court. *See United States v. Rodriguez-Pacheco,* 475 F.3d 434,438 (1st Cir. 2007); *Ed Peters Jewelry Co. v. C&J Jewelry Co.,* 215 F.3d 182, 191 (1st Cir. 2000) *See also Figueroa v. Rivera,* 147 F.3d 77, 81 (1st Cir. 1998)(noting that the Supreme Court "has admonished the lower federal court to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court "the prerogative of overruling its own decisions")(citations omitted); *In re Grand Jury Subpoenas,* 123 F.3d 695, 697

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[7] See *Horn v. Quarterman,* 508 F.3d 306, 319 (5th Cir. 2007) ("agree in dicta "that Crawford overruled Roberts" but holding that *Maryland v. Craig,* 497 U.S. 836 (1990), which used a Roberts analysis to construe the Confrontation Clause, was still good law); *Middleton v. Roper,* 455 F.3d 838, 857 n. 6 (8th Cir. 2006)(leaving issue open, noting only that "Crawford casts doubt on whether the reliability analysis discussed in [Roberts] and Roberts' progeny, 'remains good law...") (citation omitted), cert. denied, 127 S.Ct. 980 (2007).

n. 2 (1st Cir. 1997)("Ordinarily, prior panel decisions are binding on future panels and it is for an *en banc* court to reexamine the status of a prior opinion"); *Atlantic Sounding Co., Inc. v. Kimbrough,* 496 F.3d 1282 (1st Cir. 2007)(a panel may depart from, an earlier panel's decision "only when the intervening Supreme Court decision is 'clearly on point.'") (citation omitted).

Yesenia's alleged statements to her mother and fellow worker did not bear the indicia of reliability required by *Roberts*. Yesenia's accusations of abuse may have been nothing more than an attempt to justify her own infidelities, especially since her complaints of abuse were not made until after Petitioner discovered and reported her affair to her parents. *See United States v. Taubman*, 297 F.3d 161, 164-65 (2nd Cir. 2002) (per curiam) (district court properly excluded defendant's statement under the state of mind exception because the statement was not made contemporaneously with the meeting to which he referred).

B. The Exclusion of Petitioner' Rebuttal Evidence

The district court compounded its errors in admitting the "domestic violence" evidence by excluding two forms of evidence Petitioner sought to use to confront that evidence: (1) the substance of the two tape recordings of Yesenia in her car that corroborated the fact that she was having an affair and was not, in fact, afraid of Petitioner and (2) defense attempts to elicit testimony about Yesenia's affair with the District Attorney who helped her file the domestic violence complaint. Once the district court admitted the hearsay, Petitioner should at least have been permitted to cross-examine the government's witnesses or introduce extrinsic evidence, such as the tapes, to raise questions

about the veracity (and reliability) of Yesenia's claims of domestic violence.

In *United States v. Grant,* 256 F.3d 1146 (11th Cir. 2001), the court reversed a conviction where the trial court barred evidence that would have impeached other hearsay admitted in support of the government's case. In *Grant*, the government was permitted to introduce as evidence against Grant certain statements made by a co-conspirator, Wilson. In Grant, unlike the instant case, there was no question that the district court was correct in initially admitting the testimony on direct under Fed. R. Evict. 801 (d)(2)(E). See *Grant,* 256 F.3d at 1152. Grant then attempted to impeach Wilson's hearsay statements, as permitted by Rule 806, by seeking to introduce an affidavit that Wilson had given Grant's attorney stating "that Grant had no knowledge of Wilson's actions in consummating the drug deal with the agents." *Id.* at 1 153, The district court, however, refused to admit the statement into evidence. The Eleventh Circuit reversed, holding that the district court's "conception of inconsistency [was] too narrow." *Id.* The Court further held that Wilson's "affidavit statements indicating that he had lied to the agents when he told them he had a partner would surely be admissible" under Rule 806. *Id.* at 1154. The Court also flatly rejected the government's argument that the affidavit could or should have been excluded under Fed. R. Evid. 403, as unfairly "prejudicial" to the government, since the affidavit, if believed by the jury, would have given Grant "a complete defense." *Id.* at 1155.

The exclusion of such evidence may also violate the Confrontation Clause. In *United States v. Moody,* 903 F.2d 321 (5th Cir. 1990), the Fifth Circuit held that the district court's exclusion of evidence impeaching hearsay admitted under Rule 801(d)(2)(E) not only violated Rule 806 but also the Confrontation Clause. *Moody,* 903 F.2d at 329.

The Fifth Circuit went on to reverse *Moody's* conviction, holding that it "cannot conclude from our review of this extensive record that the confrontational error in this case was harmless beyond a reasonable doubt." *Id.* at 329.

The Fifth Circuit later found a second confrontation violation, due to the district court's admission of improper rebuttal testimony, and reversed *Moody's* conviction for the "aggregate" of the two errors. *Id.* at 331. *Cf. Smith v. Fairman,* 862 F.2d 630, 638 (7th Cir. 1988)(erroneous exclusion of evidence admissible under Rule 806 violated the Confrontation Clause but error was harmless under the circumstances).

In the instant case, the Court should reverse Petitioner' conviction due to the cumulative effect of the appellate court's erroneous rulings that not only violated the Federal Rules of Evidence but also the Sixth Amendments Confrontation Clause.

WAS PETITIONER'S SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE VIOLATED WHEN THE COURT REFUSED TO ALLOW PETITIONER TO PRESENT A DEFENSE VIA EXPERT TESTIMONY ON THE FLAWS OF EYEWITNESS IDENTIFICATION

Courts, psychologists and commentators all now agree that "identification of strangers is proverbially untrustworthy." *Felix Frankfurter, The Case of Sacco and Vanzetti: A Critical Analysis for Lawyers and Laymen* 30 (Universal Library ed., Grosset & Dunlap 1962) (1927). See generally *United States v. Wade,* 388 U.S. 218, 228 (1967)("vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification"); *C. Ronald Huff el at, Guilty Until Proven Innocent: Wrong Conviction and Public Policy,* 32 Crime & Delinq. 518, 524 (1986)("the single most important factor leading to wrongful conviction in the United States is eyewitness misidentification"). In 209 out of 328 cases (64%) of wrongful convictions identified by a recent exoneration study, at least one eyewitness misidentified the defendant. See Samuel R. Gross *et at, Exonerations in the United States: 1989-2003* 95 I CRIM. L. & CRIMINOLOGY 523, 542 (2004). Indeed, "mistaken eyewitness identifications are responsible for more wrongful convictions than all other causes combined." A. Daniel Yarmey, *Expert Testimony: Does Eyewitness Memory Research Have Probative Value for the Courts?,* 42 Canadian Psychology 92, 93 (May 2001). [E]yewitness evidence presented from well-meaning and confident citizens is highly persuasive but, at the same time, ***is among the least reliable forms of evidence."*** *Id.* (emphasis added.)

Courts and commentators have now come to the same conclusion - that misidentifications are "the single most important factor leading to wrongful convictions in the United States." *United States v. Brownlee*, 454 F.3d 131, 141 (3rd Cir. 2006) (quoting C. Ronald Huff et al., *Guilty Until Proven Innocent: Wrongful Conviction and Public Policy*, 32 Crime & Delinq. 518, 524 (1986)). *See also* Steven B. Duke, Ann Seung-Eun Lee, and Chet K.W. Pager, *A Picture's Worth a Thousand Words: Conversational Versus Eyewitness Testimony in Criminal Convictions*, 44 AM. CRIM. L. REV. 1 (Winter 2007).

Despite the unanimous agreement among courts and academia that eyewitness identifications are scientifically unreliable, jurors absent education by expert testimony are blind to these defects, "seldom enter a courtroom with the knowledge that eyewitness identifications are unreliable." *Rudolf Koch, Note, Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 Cornell L. Rev. 1097, 1099 n.7 (2003). Thus, while science has firmly established the "inherent unreliability of human perception and memory," *id. at* 1102 (internal quotations omitted), this reality is outside "the jury's common knowledge," and often contradicts jurors' "commonsense" understandings. *Id.* at 1105 n. 48 (internal quotations omitted). See *Ferensic v. Birkett*, 501 F.3d 469 (6th Cir. 2007). Faced with "tragic irony of eyewitness testimony," *Koch, Process v. Outcome*. supra, at 1098 (quoting Lawrence Taylor, *Eyewitness Identification* 1 (1982)), and no physical scientific means of exonerating himself, Petitioner sought to introduce expert testimony through one of the most recognized experts in

the field, Dr. Geoffrey Loftus,[8] to establish the inherent unreliability of human perception and memory.

Federal Rule of Evidence 702 "authorizes the admission of expert testimony so long as it is rendered by a qualified expert and is helpful to the trier of fact." *DeLuca v. Merrell Dow Pharm., Inc.*, 911 F.2d 941, 954 (3rd Cir. 1990). Despite this growing body of scientific knowledge, the First Circuit Court has, to date, taken a middle road in addressing the admissibility of expert testimony on the inherent unreliability of eyewitness identifications. *See Stokes,* 388 F.3d 26 (1st Cir. 2004)(noting that the Court has been "unwilling to adopt a blanket rule that qualified expert testimony on eyewitness identification must routinely be admitted or excluded," quoting *United States v. Brien*, 59 F.3d 274, 276 (1st Cir. 1995)).

At least under the circumstances of this case, the Appellate Court should have held that the district court abused its discretion in excluding Dr. Loftus' testimony without a hearing. Numerous courts have found the exclusion of expert testimony regarding eyewitness identification is an abuse of discretion in certain situations. See *United States v. Brownlee,* 454 F.3d 131 (3rd Cir. 2006); *United States v. Smithers,* 212 F.3d 306 (6th Cir. 2000); *United States v. Lester*, 254 F.Supp. 2d 602 (E.D. Va. 2003); *United States v. Norwood,* 939 F. Supp. 1 132 (D. N.J. 1996); *People v, Allen,* 376 Ill. App. 3d 511, 875 N.E.2d 1221 (2007); *People v. LeGrand,* 8 N.Y.3d 449, 867 N.E.2d 374, 835 N.Y.S.2d 523 (2007); *State v,*

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[8] "Dr. Loftus is unquestionably an expert in this field. See *United States v Mathis*, 264 F.3d 321 (3rd Cir. 2001).

Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983); *People v. Campbell,* 847 P.2d 228 (Cob. App. 1992).

In *Brownlee,* the court held the primary issue before the jury was the reliability of the government's four eyewitnesses. The court noted:

> "Both expressed high confidence in their identifications of [the defendant] as the perpetrator. To rebut the natural assumption that such a strong expression of confidence indicates an unusually reliable identification, [the defendant] sought to admit testimony that there is a low correlation between confidence and accuracy. We believe that [the expert's] proposed testimony 'is sufficiently tied to the facts of this case' that it will aid the jury in resolving a factual dispute." *Id.* Brown 454 F.3d at 144 (citation omitted).

Recognizing that "the science of eyewitness perception has achieved the level of exactness, methodology and reliability of any psychological research," the Third Circuit reversed the defendant's conviction. *Id.* at 143-44. Most recently, the Sixth Circuit in *Ferensic v. Birkett,* 501 F.3d 469, 478 (6th Cir. 2007), found that the exclusion of expert testimony on the inherent defects in eyewitness identifications violated the Sixth Amendment, citing the "current near-universal acceptance of the reliability of expert testimony regarding eyewitness identification...." In the instant case, Petitioner submitted an offer of proof in the form of an extensive report prepared by Dr. Loftus, an experienced and highly-credentialed psychologist. In light of the fact that there was no physical evidence linking Petitioner to either the carjacking or the alleged murder, the significance of Colon's identification was the crux of the prosecution. See. *LeGrand,* 8 N.Y.3d at 457 (trial court

abused its discretion in excluding expert where the case turned on the accuracy of the single witness' identification).

Equally troubling was the district court's decision to rule without conducting an evidentiary hearing. See *Allen*, 376 Ill. App. 3d at 526, 875 N.E.2d at 1233 (reversing where trial court failed to "conduct a meaningful inquiry into [expert's] proposed testimony") Under these circumstances, the district court had no "discretion" to bar the testimony. Petitioner had the constitutional right to present Dr. Loftus as a witness in his own defense. See *Taylor v. Illinois*, 484 U.S. 400, 409 (1988). The defendant's right to compulsory process is itself designed to vindicate the principle that the "ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States v. Nixon*, 418 U.S., at 709, 94 S.Ct. at 3108. Rules that provide for pretrial discovery of an opponent's witnesses serve the same high purpose. At a minimum, criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before jury evidence that might influence the determination of guilt. *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 1000, 94 L.Ed.2d 40 (1987). Few rights are more fundamental than that of an accused to present witnesses in his own defense, see, *e.g., Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973). Indeed, this right is an essential attribute of the adversary system itself.

An analogous situation occurred in *United States v. Shay*, 57 F.3d 126 (1st Cir. 1995). In that case, the defendant was convicted of conspiracy and aiding and abetting an attempt to blow up his father's car. In seeking

to prove Shay's complicity in the conspiracy, the government introduced incriminating statements Shay had made to the police, the media and fellow inmates.

At trial, Shay sought to rebut the implication of these statements by having a psychiatrist testify that he suffered from a mental disorder ("Pseudologia fantastica") which "causes its victims to make false and grandiose statements without regard to the consequences." *Shay,* 57 F.3d at 128 & n. 1. The district court excluded the testimony under Fed. R. Evid. 702, holding that the jury was capable of evaluating the reliability of Shay's statements without the testimony. The First Circuit reversed both that ruling and Shay's conviction, holding that Shay's own testimony that he frequently "told lies and boasted to an unusual degree" was "standing alone ... much less powerful than the psychiatric testimony that Dr. Phillips was prepared to offer." *Id.* at 133. Therefore, "it was a clear error for the district court to exclude the testimony under any plausible interpretation of Rule 702." *Id.* at 134.

For the same reason, Petitioner had the right, both under Rule 702 and the Sixth Amendment, to show that the alleged identification was highly suspect and not sufficient for a reasonable jury to convict him.

SHOULD A WRIT OF CERTIORARI BE GRANTED TO CLARIFY WHETHER TITLE 18 U.S.C. § 2119 IS VIOLATED AS A "SPECIALIZED OFFENSE" THAT REQUIRES THE GOVERNMENT PROVE "A SPECIFIC CRIMINAL ACT AND A NARROW MENS REA" OR IS THE CRIME ONE THAT IS MEASURED AT THE COMMENCEMENT AND DURING A PROLONGED CARJACKING OFFENSE

A. The Current Standard

To sustain a criminal conviction, the evidence presented by the government must pass a well-established test. The evidence must be sufficient to convince a reasonable, rational jury that the government proved all the essential elements of the charged offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 317 (1979); *United States v. Morillo*, 158 F.3d 18,22 (1st Cir. 1998) The constitutional standard recognized in the *Winship* case was expressly phrased as one that protects an accused against a conviction except on "*proof* beyond a reasonable doubt . . . ." In subsequent cases discussing the reasonable-doubt standard, the court has never departed from this definition of the rule or from the *In re Winship*,397 U.S. 358, 90 S.Ct. 1068 (U.S.N.Y. 1970), understanding of the central purposes it serves. See, *e. g., Ivan V. v. City of New York*, 407 U.S. 203, 204, 92 S.Ct. 1951, 1952, 32 L.Ed.2d 659; *Lego v. Twomey*, 404 U.S. 477, 486-487, 92 S.Ct. 619, 625-626, 30 L.Ed.2d 618; *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508; *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281; *Cool v. United States*, 409 U.S. 100, 104, 93 S.Ct. 354, 357, 34 L.Ed.2d 335. In short, *Winship* presupposes as an essential of the

due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

While the Appellate Court will view the evidence in a light most favorable to the government, *United States v. Giasser,* 315 U.S. 60, 80 (1942), the Court does not have "license to let the "imagination run rampant." *United States v. Soto,* 716 F.2d 989,993 (2nd Cir. 1983), *quoting United States v. Mora,* 598 F.2d 682, 684 (1st Cir. 1979).

Viewing the evidence in a light favorable to the government's interpretation it does not justify "piling inference upon inference" to reach the government's desired end result. *Direct Sales Co. v. United States,* 319 U.S. 703, 711 (1943); *United States v. Aguiar,* 610 F.2d 1296 (5th Cir. 1980) The Court must reject evidentiary interpretations that are "unreasonable, unsupportable, or overly speculative." *Morillo,* 158 F.3d at 22-- 23 (citation omitted). And, "where an equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence is supported by the evidence viewed in the light most favorable to the prosecution, "a reasonable jury must necessarily entertain a reasonable doubt," *Morillo,* 158 F.3d at 22, quoting *United States v. Flores-Rivera,* 56 F.3d 319, 323 (1st Cir. 1995) (citations omitted).

B. The Specialized Mens Rea in Carjacking Cases

Section 2119 provides, in pertinent part:

> Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has, been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation ... shall ... (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

Id. Title 18 U.S.C. § 2119

The First Circuit and others, have characterized Section 2119 as a "specialized offense" that requires the government to prove "a specific criminal act and a narrow mens rea." See, *United States v. Rosario-Diaz,* 202 F.3d 54, 63 (1st Cir. 2000). Section 2119 is "not a felony murder analog." *United States v. Matos-Quinones,* 456 F. 3d 14, 17(1st Cir.), *cert. denied,* 127 S.Ct. 751 (2006). Rather, it requires the government to prove not only that the defendant "committed a carjacking and that [killed] the victim, but also that "acted with intent to cause death or serious bodily harm" *at the precise moment of the carjacking.* See, *Matos-Quinones,* 456 F.3d at 18, citing *Holloway v. United States*, 526 U.S. 1, 6-7 (1999) (requiring the forbidden mens rea at "the relevant moment"). Accord *United States v. Harris*, 420 F.3d 467, 478 (5th Cir. 2005)(intent in a carjacking case must be measured at "the precise moment" the defendant "demanded or took control over the car"); *United States v, Appelwhaite,* 195 F.3d 679, 685 (1st Cir. 1999)("statute

directs the fact finder's attention to the defendant's state of mind at the precise moment he detained or took control over the car").

When the evidence is lacking on the narrow question issue of "timing," the Court must reverse and allow "local courts" to resolve issues "more logically" adjudicated by them, *Rosario-Diaz,* 202 F.3d at 64 (reversing carjacking convictions of two defendants despite "the hideous nature of the crimes committed" because "a court of law is required to make its rulings on principled grounds"). See also Hornby, Pattern Criminal Jury Instructions for the District Courts of the First Circuit, 2005 Revisions, 157[9] (*citing Rosario-Diaz,* 202 F.3d at 63). Moreover, it is not enough that the government's evidence raised a "possibility" that Petitioner had the requisite intent; rather, the evidence must rise to the level of a "reasonable likelihood" that he had the requisite mens rea at the precise moment. *Rosario-Diaz,* 202 F.3d at 63 & n, 1

In *Matos-Quinones*, the Court believed it was still an open question in this First Circuit "whether the intent element for carjacking must be measured at the commencement of a prolonged carjacking" but nonetheless "assumed without deciding that this was the case." *Matos-Quinones,* at 19.

In the instant case, it was pure speculation that Petitioner intended to kill Yesenia at the moment Colon allegedly saw him struggling with Yesenia in her Toyota. Indeed, when Colon passed by, the struggle had ended. There is utterly no evidence that it even was Petitioner who killed her, let alone evidence of when, or under what circumstances her death occurred. Yesenia's body was

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[9]The instructions are available at:
http://ww.mcd.uscourts.gov/practices/Criminal_jury_Instructions.pdf

never recovered and no physical evidence even linked Petitioner to Yesenia's charred vehicle.

This was not a case where witnesses saw the defendant holding a "loaded handgun" to the head of the victim. *See, e.g., Matos-Quinones,* 456 F.3d at 21 (affirming carjacking conviction where the defendant "pressed a loaded handgun against the victim's body," threatened her with death and the evidence established that "he eventually ***did kill*** the victim") (emphasis in original); *United States v. Lebron-Cepeda,* 324 F.3d 52, 57 (1st Cir.)(intent established where one defendant placed a gun against the driver's head and threatened him ***at the inception of the carjacking***), *cert denied,* 124 S.Ct. 232(2003); *United States v. Foster,* 507 F.3d 233, (4th Cir. 2007)(evidence established that the defendant "placed a gun to [victim's] head and ordered [passengers] out of the car"). See also *United States v. Adams,* 265 F.3d 420, 424 (6th Cir. 2001); *United States v. Lake,* 150 F.3d 269, 272 (3rd Cir. 1998).

The sole evidence relating to how Yesenia's vehicle was allegedly carjacked came from Colon, who could only give vague testimony about a temporary struggle or argument, coupled with the departure of the car. That evidence was woefully insufficient to prove the link necessary to support his federal prosecution of what should otherwise have been a local matter. *See Rosario-Diaz*, 202 F.3d. at 63-64 (evidence that only raised "a possibility" but not a "probability or a likelihood" that defendant had the requisite intent insufficient); *Harris,* 420 F.3d at 475 (reversing carjacking conviction for insufficient evidence where there was "no testimony as to the precise circumstances surrounding the moment in which the defendant demanded or took control of the car," no "physical evidence illuminating that moment in time" and no testimony of threats from the defendant "at the moment

he demanded or took control of the car"); *Applewhaite,* 195 F.3d at 685 (carjacking conviction reversed where the evidence did not establish that force was used to obtain the victim's van).

All the government had was "speculation" and that was insufficient under the unique requirements of § 2119. *Harris,* 420 F.3d at 474 ("speculation on the basis of evidence does not a reasonable inference make"); *United States v. Jones,* 44 F.3d 860, 865 (10th Cir. 1995) ("an inference must be more than speculation and conjecture to be reasonable").

CONCLUSION

Based on the foregoing, this Court should grant this request for a Writ of Certiorari and remand order the Court of Appeals for the First Circuit.

Done this 11, day of December 2009

Respectfully submitted,

Erick Morales-Perez, Esquire
Puerto Rico Bar # 203211
P.O. Box 10409
San Juan, PR 00922
(787) 605-8000 Office
Email: ekmorpr@yahoo.com

APPENDIX -A

United States Court of Appeals,
First Circuit.

UNITED STATES of America, Appellee,

v.

Eddie S. RODRÍGUEZ-BERRÍOS, Defendant-Appellant.

No. 07-1854.

Heard Oct. 30, 2008.

Decided July 23, 2009.

Background: Defendant was convicted in the United States District Court for the District of Puerto Rico, Juan M. Pérez-Giménez, J., of carjacking resulting in death and was sentenced to life imprisonment followed by five years of supervised release. Defendant appealed.

Background: Defendant was convicted in the United States District Court for the District of Puerto Rico, Juan M. Pérez-Giménez, J., of carjacking resulting in death and was sentenced to life imprisonment followed by five years of supervised release. Defendant appealed.

Holdings: The Court of Appeals, Lipez, Circuit Judge, held that:

(1) evidence of defendant's prior abuse and stalking of victim was admissible evidence of prior crimes, wrongs, or acts;

(2) sufficient evidence supported jury's finding that defendant had requisite intent;
(3) tape recordings of victim talking to passengers in her vehicle and on her cellular phone while she was driving were not admissible;
(4) district court did not abuse its discretion in refusing to allow defendant to inquire about victim's alleged affair with a district attorney;
(5) district court did not abuse its discretion in refusing to allow defendant to present expert testimony regarding the reliability of eyewitness identification;
(6) district court did not abuse its discretion in refusing to grant a mistrial; and
(7) erroneous admission of certain statements was harmless.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⊂1153.1

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence
110k1153.1 k. In General. Most Cited Cases

An appellate court reviews a trial court's decision to admit or exclude evidence in a criminal case for abuse of discretion.

[2] Criminal Law 110 ⊂366(3)

110 Criminal Law

110XVII Evidence
110XVII(E) Res Gestae
110k362 Res Gestae; Excited Utterances
110k366 Acts and Statements of Person Injured
110k366(3) k. Subsequent to Commission of

Crime in General. Most Cited Cases
Victim's statements to witness about past abuse by defendant charged with carjacking that resulted in death were not admissible hearsay under excited utterance exception, absent evidence of a startling event occurring anytime near the victim's statements. Fed.Rules Evid.Rule 803(2), 28 U.S.C.A.

[3] Criminal Law 110 ⟸419(2.20)

110 Criminal Law
110XVII Evidence
110XVII (N) Hearsay
110k419 Hearsay in General
110k419(2.20) k. Then-Existing State of Mind or Body. Most Cited Cases
Victim's identification of her bruises was not admissible hearsay in defendant's trial for carjacking that resulted in death as a statement of then existing mental, emotional, or physical condition. Fed.Rules Evid.Rule 803(3), 28 U.S.C.A.

[4] Criminal Law 110 ⟸419(1.10)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General

110k419(1.10)k. Exceptions to Hearsay Rule, and Non-Hearsay Distinguished in General. Most Cited Cases

Witness's testimony that carjacking victim lost control and started crying after defendant elbowed her in the hallway was not a hearsay statement, as there was no statement involved in the testimony. Fed.Rules Evid.Rule 801(c), 28 U.S.C.A.

[5] Criminal Law 110 ⊂368(3)

110 Criminal Law
110XVII Evidence
110XVII(E) Res Gestae
110k362 Res Gestae; Excited Utterances
110k368 Acts and Statements of Third Persons
110k368(3) k. Subsequent to Commission of Crime. Most Cited Cases

Criminal Law 110 ⊂419(2.20)

110 Criminal Law
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(2.20) k. Then-Existing State of Mind or Body. Most Cited Cases

Testimony of victim's mother that, after being told that defendant had surreptitiously recorded her in her car, victim accused defendant of following her everywhere and said she could not have lunch in peace because of his

stalking, and that victim called the defendant "an abuser" and said that he "would drop the baby at her from far away, that she was afraid the baby might drop," were not admissible hearsay under the state of mind or excited utterance exceptions in defendant's trial for carjacking resulting in death. Fed.Rules Evid.Rule 803, 28 U.S.C.A.

[6] Criminal Law 110 ⇐1036.5

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV (E)1 In General
110k1036 Evidence
110k1036.5 k. Hearsay. Most Cited Cases

Defendant charged with carjacking resulting in death waived his right to make argument on appeal that the admission of victim's protective order against him constructively amounted to admission of indirect testimonial hearsay in the form of the statements of the victim required to obtain the protective order, where, defendant, after failing to object to testimony relating to the order during direct examination of victim's mother, objected when the government sought to enter the actual protective order into evidence, but subsequently reached a compromise allowing judicial notice of the protective order.

[7] Criminal Law 110 ⚿1137(1)

110 Criminal Law
110XXIV Review
110XXIV (L) Scope of Review in General
110XXIV(L)11 Parties Entitled to Allege Error
110k1137 Estoppel
110k1137(1) k. In General. Most Cited Cases

A party who identifies an issue in a criminal trial, and then explicitly withdraws it, has waived the issue.

[8] Criminal Law 110 ⚿371(8)

110 Criminal Law
110XVII Evidence
110XVII(F) Other Offenses
110k371 Acts Showing Intent or Malice or Motive
110k371(8) k. In Prosecutions for Robbery. Most Cited Cases

Criminal Law 110 ⚿371(12)

110 Criminal Law
110XVII Evidence
110XVII(F) Other Offenses
110k371 Acts Showing Intent or Malice or Motive
110k371(12) k. Motive. Most Cited Cases

Evidence of defendant's prior abuse and stalking of victim was admissible evidence of prior crimes, wrongs, or acts in defendant's trial for carjacking resulting in death; evidence of defendant's intentional physical harm of victim in the past had special relevance because it was probative of his intent to cause her harm at the time he seized her car, and

defendant's stalking had special relevance because it demonstrated defendant's motive to commit the crime, his intense jealousy, and given the defendant's claim that he was innocent of causing the victim's disappearance and death, the government was entitled to establish that motive to commit the crime. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[9] Criminal Law 110 ⚿369.2(1)

110 Criminal Law
110XVII Evidence
110XVII(F) Other Offenses
110k369 Other Offenses as Evidence of Offense Charged in General
110k369.2 Evidence Relevant to Offense, Also Relating to Other Offenses in General
110k369.2(1) k. In General. Most Cited Cases

Evidence of prior acts may not be used for the sole purpose of proving that a defendant had a propensity to commit a crime; such prior act evidence is admissible, however, for other relevant purposes, such as to prove motive, intent, preparation, or plan. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

[10] Criminal Law 110 ⚿369.2(1)

110 Criminal Law
110XVII Evidence
110XVII(F) Other Offenses
110k369 Other Offenses as Evidence of Offense Charged in General
110k369.2 Evidence Relevant to Offense, Also Relating to Other Offenses in General

110k369.2(1) k. In General. Most Cited Cases

Two-part test exists for evaluating the admissibility of evidence of prior crimes, wrongs, or acts: first, a court must determine whether the proffered evidence has special relevance, in other words, whether it is relevant to any purpose other than to prove that a defendant has a propensity to commit a crime; if the court finds a special relevance for the evidence, it must then evaluate it to determine whether the probative value of the evidence is substantially outweighed by its danger of unfair prejudice. Fed.Rules Evid.Rules 404(b), 403, 28 U.S.C.A.

[11] Criminal Law 110 ⚿1134.70

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)7 Nature of Decision Appealed from as Affecting Scope of Review
110k1134.70 k. In General. Most Cited Cases

Criminal Law 110 ⚿1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In General. Most Cited Cases

Criminal Law 110 ⚿1144.13(2.1)

110 Criminal Law

110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.13 Sufficiency of Evidence
110k1144.13(2) Construction of Evidence
110k1144.13(2.1) k. In General. Most Cited Cases

Criminal Law 110 ⇐1159.2(7)

110 Criminal Law
110XXIV Review
110XXIV(P) Verdicts
110k1159 Conclusiveness of Verdict
110k1159.2 Weight of Evidence in General
110k1159.2(7) k. Reasonable Doubt. Most Cited Cases

Challenges to the sufficiency of the evidence and to the denial of a the motion for judgment of acquittal raise a single issue, which a court of appeals reviews de novo; the court inquires whether, taking the evidence in the light most favorable to the jury verdict, a reasonable fact finder could have found the defendant guilty beyond a reasonable doubt.

[12] Robbery 342 ⇐24.35

342 Robbery
342k24 Weight and Sufficiency of Evidence
342k24.35 k. Intent. Most Cited Cases

Sufficient evidence supported jury's finding, in convicting defendant of carjacking resulting in death, that defendant had the intent to kill or seriously harm victim when he took control of her car; eyewitness recounted seeing defendant

sitting in the passenger seat of the victim's car shortly before her disappearance, the car was pulled to the side of the road and the passenger door was open, and the eyewitness observed defendant striking the victim, and heard the victim say "leave me alone," there was also evidence of defendant's prior threats and physical assaults against victim, and after the murder, defendant admitted to colleagues that he had been "upset and angry" with the victim and a man with whom he believed she was having an affair, and after defendant was told there was enough evidence to file charges against him and also against his younger brother, defendant responded that he had acted alone and that his brother had not been involved. 18 U.S.C.A. § 2119.

[13] Robbery 342 ⚿3

342 Robbery
342k3 k. Intent. Most Cited Cases
The element of intent to cause death or serious bodily harm in statute for carjacking that results in death must be established at the time the defendant takes control of the motor vehicle. 18 U.S.C.A. § 2119.

[14] Witnesses 410 ⚿380(3)

410 Witnesses
410IV Credibility and Impeachment
410IV(D) Inconsistent Statements by Witness
410k380 Witnesses Who May Be Impeached by Inconsistent Statements
410k380(3) k. Impeachment of Testimony of Deceased or Absent Witness. Most Cited Cases

Tape recordings of victim talking to passengers in her vehicle and on her cellular phone while she was driving were not admissible in defendant's trial for carjacking resulting in death to impeach hearsay statements of victims, entered through government witnesses, that described defendant's abuse; despite defendant's contention that victim's tone and attitude, as reflected on the tapes, corroborated the fact that victim was not, in fact, afraid of defendant, the admitted hearsay statements indicated that defendant had abused and stalked victim, and there was nothing on the tapes even suggesting that defendant did not do so. Fed.Rules Evid.Rule 806, 28 U.S.C.A.

[15] Witnesses 410 ⇐331.5

410 Witnesses
410IV Credibility and Impeachment
410IV (A) In General
410k331.5 k. Competency of Impeaching Evidence in General. Most Cited Cases

District court did not abuse its discretion in refusing to allow defendant to inquire on cross-examination of the victim's mother and her co-worker about the victim's alleged affair with a district attorney, in defendant's trial for carjacking resulting in death; despite defendant's argument that he should have been allowed to introduce evidence of victim's affair to impeach the inference sought by the government from the fact that a domestic violence complaint had been filed against him, i.e., to infer that the complaint was only filed because of the district attorney's influence in the district attorney's office, the inquiry into the alleged affair had a high potential for prejudice and a low probative value. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

[16] Criminal Law 110 ⚿474.3(2)

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k474.3 Credibility, Veracity, or Competency
110k474.3(2) k. Eyewitnesses. Most Cited Cases

District court did not abuse its discretion in refusing to allow defendant to present testimony from an expert witness regarding the reliability of eyewitness identification in defendant's trial for carjacking resulting in death; the district court carefully considered the factors set forth as relevant to the issue of whether to admit expert witnesses on eyewitness identification, first examining the importance of the eyewitness evidence that the expert sought to address and explained that the relevant factors of lighting, lack of attention, and post-event information were particularly susceptible to exposure through cross-examination without the benefit of expert testimony, and the district court concluded that the expert's proffered testimony had the potential to be seriously misleading in light of the jurors' possible tendency to give undue weight to expert testimony. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[17] Criminal Law 110 ⚿1153.12(3)

110 Criminal Law
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception and Admissibility of Evidence

110k1153.12 Opinion Evidence
110k1153.12(3) k. Admissibility. Most Cited Cases
A court of appeals reviews a decision to exclude expert testimony in a criminal trial for abuse of discretion.

[18] Criminal Law 110 ⚿474.3(2)

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k474.3 Credibility, Veracity, or Competency
110k474.3(2) k. Eyewitnesses. Most Cited Cases
The admission of expert testimony on the flaws inherent in eyewitness identification is a matter of case-by-case discretion.

[19] Criminal Law 110 ⚿867.14(4)

110 Criminal Law
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k867 Discharge of Jury Without Verdict; Mistrial
110k867.14 Witnesses
110k867.14(4) k. Unresponsive, Unsolicited, and Unexpected Testimony. Most Cited Cases
District court did not abuse its discretion in refusing to grant a mistrial in defendant's trial for carjacking resulting in death after a government witness inappropriately testified that defendant had been summoned to take a polygraph test during the course of the investigation into

the victim's disappearance, where the witness was immediately reprimanded in front of the jury and the testimony stricken, and the next day, the jurors were given a lengthy curative instruction that reminded them of their duty to follow the judge's instructions to disregard the testimony.

[20] Criminal Law 110 ⚿388.5(1)

110 Criminal Law
110XVII Evidence
110XVII (I) Competency in General
110k388 Experiments and Tests; Scientific and Survey Evidence
110k388.5 Lie Detector or Polygraph Tests and Procedures
110k388.5(1) k. In General. Most Cited Cases
Polygraph results are rarely admissible in a criminal trial.

[21] Criminal Law 110 ⚿1169.1(4)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.1 In General
110k1169.1(2) Particular Offenses and Prosecutions
110k1169.1(4) k. Burglary, Robbery, Larceny, and Embezzlement; Stolen Property. Most Cited Cases

Erroneous admission of certain statements in defendant's trial for carjacking resulting in death, including victim's

identification of her bruises as having been caused by defendant, victim's statement that she was afraid of defendant, victim's statement that defendant was an "abuser," victim's statement that defendant would throw their baby at her, and victim's statement that she could not "have lunch in peace," was harmless, in light of the statements' lack of centrality to the government's case, their redundancy, and the relative strength of the government's case against defendant.

[22] Criminal Law 110 ⚿1169.1(1)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.1 In General
110k1169.1(1) k. Evidence in General. Most Cited Cases
The essential inquiry in harmless error review in a criminal trial is whether the improperly admitted evidence likely affected the outcome of the trial; this inquiry is case-specific and includes consideration of such factors as the centrality of the tainted evidence, its uniqueness, its prejudicial impact, the use to which evidence was put, and the relative strengths of the parties' cases.

***59** G. Richard Strafer, for Appellant.
Vijay Shanker, Attorney, United States Department of Justice, with whom Rosa Emilia Rodriguez-Velez, United States Attorney, and Nelson Perez-Sosa, Assistant United States Attorney, were on brief, for appellee.

Before TORRUELLA, LIPEZ, and HOWARD, Circuit Judges.

LIPEZ, Circuit Judge.

After a jury trial, appellant Eddie Samir Rodríguez-Berríos was found guilty of committing a carjacking that resulted in the death of his ex-wife. He now challenges that conviction, arguing that the evidence against him was insufficient to support the jury's verdict that he had the requisite intent to commit a carjacking. He also claims that the trial judge made several erroneous evidentiary rulings, erred in excluding the testimony of a proffered expert witness on the flaws in eyewitness identification, and erred in denying his motion for a mistrial after a government agent referred in his testimony to a polygraph examination that appellant had been summoned to take. For the reasons set forth below, we affirm the conviction.

I.

Appellant was a police officer for the Commonwealth of Puerto Rico in Guayama. In 1995, he married the victim, Yesenia Ortiz-Acosta ("Ortiz"). They had one daughter together and were then divorced in February 1999. Ortiz disappeared approximately two months later, on April 15th, 1999, while driving her car in Guayama. About two weeks after her disappearance, her burned-out car was found in an area where smoke had been seen on the night she had disappeared. The car had been intentionally burned with an accelerant, such as gasoline, and the victim's body was never found. Appellant quickly became a suspect in the investigation of his ex-wife's disappearance. During the following month, he made several incriminating admissions linking him to her murder.

On April 14, 2004, a grand jury indicted appellant and two co-defendants for conspiracy to commit a carjacking

(count one), *60 carjacking resulting in death (count two), and using fire to commit the felonies of conspiracy and carjacking (count three). The government later dismissed all charges against the two co-defendants and counts one and three against appellant. Appellant then faced one charge for committing a carjacking resulting in death, in violation of 18 U.S.C. § 2119(3).

The jury trial began on September 7, 2006. During its case-in-chief, the government sought to describe a pattern of abuse and stalking of the victim by appellant in the months leading up to the victim's disappearance. Often over appellant's objections, several prosecution witnesses recounted their own observations of his abuse, stalking, and threats as well as statements made by the victim describing the same.

In his defense, appellant presented alibi witnesses, including his brother, who claimed that he spent the early evening of April 15th fishing with appellant. Appellant's ex-girlfriend then testified that she went to get ice cream with him when he returned from fishing. Appellant also testified, denying involvement in the victim's death and denying making the incriminating statements. He also denied several of the incidents of abuse and stalking described by prosecution witnesses.

At the close of evidence, appellant moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The court denied the motion. On September 13, 2006, the jury found appellant guilty of carjacking resulting in death. The district court sentenced him to life imprisonment followed by five years of supervised release.FN1 This appeal followed.

FN1. Although appellant's life sentence means that he will never serve the term of supervised release, the Sentencing

Guide-lines instruct courts to impose a term of supervised release whenever imposing a sentence of imprisonment of one year or more. U.S.S.G. § 5D1.1. For Class A felonies, the sentence should be least three years but not more than five years. U.S.S.G. § 5D1.2. Terms of supervised release following life sentences are, therefore, not uncommon. See, e.g., *United States v. Mitchell,* 568 F.3d 1147, 1148 (9th Cir.2009); *United States v. Reyes-Echevarria*, 345 F.3d 1, 2 (1st Cir.2003*); United States v. Nelson-Rodriguez*, 319 F.3d 12, 27 (1st Cir.2003).

II.

[1] Although appellant challenges the sufficiency of the evidence supporting the intent element of the carjacking conviction, he also claims that the district court erred in the admission of certain evidence. Because our resolution of those evidentiary challenges affects the body of evidence we may consider in assessing the sufficiency of the evidence, we will assess the evidentiary challenges first. See *United States v. Avilés-Colón*, 536 F.3d 1, 13 (1st Cir.2008). We review a trial court's decision to admit or exclude evidence for abuse of discretion. *United States v. Gilbert,* 181 F.3d 152, 160 (1st Cir.1999).

A. Hearsay Challenges

1. The Statements

Appellant contends that Rosa Ramos-Rodríguez ("Ramos"), a coworker and friend of the victim, was improperly allowed to testify about hearsay statements made by the victim. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801(c). Under the Federal Rules of Evidence, hearsay statements may not be admitted unless they fall within an exception or exclusion to the hearsay rules. Fed.R.Evid. 802.

*61 Appellant challenges Ramos's testimony that the victim told her that bruises on her arm were caused by appellant and that "she was afraid, afraid of him," and that she observed appellant pass the victim in a hallway and nudge her with his elbow, a seemingly minor incident that nonetheless caused the victim to become upset and to "los[e] control." Over defendant's hearsay objections, the court ruled that this evidence was admissible under Rule 803(2), which excepts excited utterances, or Rule 803(3), which excepts statements about "then existing mental, emotional, or physical condition[s]" (also known as the state of mind exception).

[2][3][4] The government correctly concedes that the victim's statements to Ramos about past abuse by appellant were neither excited utterances nor admissible expressions of the victim's state of mind. Excited utterances are statements related to a startling event made while the declarant is "under the stress of excitement caused by the event or condition." Fed.R.Evid. 803(2). There is no evidence of a startling event occurring anytime near the victim's identification of her bruises or her statement that

she feared appellant. We also agree that the statement identifying the cause of the victim's bruises was not admissible as a statement of "then existing mental, emotional, or physical condition," Fed.R.Evid. 803(3). As for her statement that she was afraid of appellant, while it did describe an emotional condition, the government acknowledges that Ortiz's state of mind was not relevant to any issue in this case.FN2

FN2. However, appellant is mistaken that Ramos's testimony that the victim lost control and started crying after appellant elbowed her in the hallway was a hearsay statement. There is no statement involved in this testimony.

[5] The defendant also attacks statements recounted by the victim's mother, Maria Cristina Acosta-Sanchez. In particular, appellant claims that the district court erred by admitting Acosta's testimony that, after being "confronted with her adultery," FN3 the victim accused appellant of following her everywhere and said that she could not "have lunch in peace" because of his stalking. Appellant also claims that Acosta was erroneously allowed to testify that the victim called the defendant "an abuser" and said that he "would drop the baby at her from far away, that she was afraid the baby might drop." The government concedes that these hearsay statements were not admissible under the state of mind or excited utterance exceptions. We agree. FN4

FN3. We note that appellant's brief, in making this argument, mischaracterizes Acosta's testimony. Acosta did not say that the victim made these accusations after being "confronted with her adultery." Rather, Acosta said that the victim made the allegations after being told that the defendant had surreptitiously recorded her in her car.

FN4. Appellant also challenges the admission of the hearsay statements on the ground that their admission violated his rights under the Sixth Amendment's Confrontation Clause. Appellant concedes that the hearsay statements admitted through the testimony of Ramos and Acosta were not "testimonial" for purposes of the Confrontation Clause analysis set forth by the Supreme Court in *Crawford v. Washington,* 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Nonetheless, he argues that we should apply the older rule of *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), to the non-testimonial hearsay and find it to be in violation of the Confrontation Clause because it was not introduced through a "firmly rooted" hearsay exception and did not bear "particularized guarantees of trustworthiness." *Ohio v. Roberts,* 448 U.S. at 66, 100 S.Ct. 2531. However, post-Crawford, the Supreme Court held in *Davis v. Washington,* 547 U.S. 813, 823-24, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), "that the Confrontation Clause applies only to testimonial hearsay." *United States v. Earle,* 488 F.3d 537, 542 (1st Cir.2007). We therefore reject appellant's argument that the non-testimonial hearsay admitted through Acosta and Ramos violated his rights under the Confrontation Clause.

*62 2. The Protective Order

[6] Appellant also challenges the district court's admission of evidence that the victim obtained a protective order against him in February 1999. He argues that the admission of evidence of the protective order constructively amounted to admission of indirect testimonial hearsay in the form of the statements of the victim required to obtain the protective order, even though

no such underlying statements were actually admitted into evidence. As such, according to appellant, the evidence about the protective order violated his rights under the Confrontation Clause.

We do not reach the merits of appellant's novel hearsay argument because we find that appellant has waived the right to make this argument on appeal. *United States v. Rodriguez,* 311 F.3d 435, 437 (1st Cir.2002) ("A party waives a right when he intentionally relinquishes or abandons it.... [A] waived issue ordinarily cannot be resurrected on appeal."). Evidence about the existence of the protective order was first admitted during the direct examination of the victim's mother, Acosta, when the government inquired about the protective order. The defendant made no objection to her testimony about the order, which included the following interchange:

Acosta: Yesenia said that she would obtain a court protective order. And I would tell her, no, not to do it, because I got scared, because-I was scared, and I thought that would make him even angrier, and that he could hurt her or worse.

Prosecutor: Do you know if Yesenia, in fact, requested a protective order?

Acosta: Yes. She went and she filed it anyway.

Prosecutor: After that day, what conversations, if any, did you have with the defendant concerning the protective order?

Acosta: He went home and told me Yesenia had obtained a court protective order. And he told me he knew what he would do before they disarmed him.

During cross-examination of Acosta, appellant's counsel asked questions about the protective order.FN5 Later, however, appellant objected when the government sought to enter the actual protective order into evidence or, alternatively, to have the court take judicial notice of the dates the order was issued and later dismissed at the victim's request. The government stated that the purpose of entering one of these two pieces of evidence was only "to establish the date it was filed and later retracted." Appellant then argued for the first time that "the order itself picks up on her statements. The statements are testimonial for *Crawford* purposes."

FN5. Counsel for appellant pursued a line of questioning about the timing of the protective order, suggesting that Ortiz had obtained the order only after her family learned that she was having an affair with another man. Appellant apparently sought to minimize the effect of the protective order by suggesting that the victim accused appellant of domestic violence and filed the protective order as a means to excuse her extra-marital affair. After a few questions on the matter, the district court sustained the government's objection to this line of questioning.

In response to appellant's objection, the court suggested taking judicial notice that, "She requested, and a Protective Order was issued February 4, and she requested that it be dropped, and it was dropped on the 9th." The Court pointed out, accurately, that there was already evidence about *63 the existence of a protective order in the record. The following interchange occurred:

The Court: Counsel, you have all the testimony in the record; that he didn't know she had requested a Protective

Order, and when he found out, he got all upset. Come on, let's don't-and there's testimony here that she requested the Protective Order.

Counsel for Appellant: I know it is true.

The Court: There's testimony here that she requested the Protective Order and that the father insisted, and she withdrew it after the father insisted. What's all the fuss? I don't understand it.

Counsel for Appellant: So what would the Court state to the jury?

The Court: The Court will not state anything.FN6 Do you have any objection that I take judicial notice of the Protective Order, which is what is before the Court?

FN6. "In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." Fed.R.Evid. 201(g). It is therefore not clear why the judge stated that he would "not state anything" about the judicially-noticed fact to the jury.

Counsel for Appellant: Judicial notice as to the dates only, not as to the contents.

The Court: Of course

Counsel for Appellant: Okay.

[....]

The Court: Do you have any objection that I take judicial notice of it?

Counsel: I don't, Your Honor.

The Court: Let's do it that way then.FN7

FN7. In the end, however, the judge's silence on the significance of judicial notice did not matter. The evidence of the dates of the protective order resulting from the court's "judicial notice" was never given to the jury.

[7] While appellant's initial failure to object to the introduction of testimony about the existence of a protective order may have led only to forfeiture of his objection, allowing us to review the challenge for plain error, *Rodriguez*, 311 F.3d at 437; *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), the subsequent compromise about judicial notice of the protective order indicates a conscious relinquishment of his objection that amounted to waiver of the right to object to the substance of the compromise. "A party who identifies an issue, and then explicitly withdraws it, has waived the issue." *Rodriguez*, 311 F.3d at 437. We therefore do not reach appellant's claims that the protective order relied on hearsay statements and that in so doing it violated his rights under the Confrontation Clause. The order may be considered as part of the body of evidence underlying appellant's conviction.

B. Rule 404(b) Challenge

[8] Appellant also argues that the district court committed error under Federal Rule of Evidence 404(b) in admitting evidence about his prior abuse and stalking of the victim. Appellant moved in limine for a determination of the admissibility of this evidence before trial.

Acknowledging the necessity of "balancing the prejudicial effect of the evidence against the probative value of the prior conduct or bad acts," the district court determined that it was better to reserve its ruling on the motion, declaring that "[t]he Court will consider Rodríguez-Berríos'[s] objections to the government's 404(b) evidence if and when they arise during trial." As it turned out, that opportunity never arose because appellant never again raised his objections. We therefore review his claims for plain error.

*64 [9] The Federal Rules of Evidence prohibit the introduction of evidence of a person's prior acts "in order to show action in conformity therewith." Fed.R.Evid. 404(b). Therefore, evidence of prior acts may not be used for the sole purpose of proving that a defendant had a propensity to commit a crime. *United States v. Jimenez,* 507 F.3d 13, 17 (1st Cir.2007). Such "prior act" evidence is admissible, however, for other relevant purposes, such as to prove motive, intent, preparation, or plan. Fed.R.Evid. 404(b).

[10] We have previously adopted a two-part test for evaluating the admissibility of evidence challenged under Rule 404(b). See *United States v. Aguilar-Aranceta,* 58 F.3d 796, 798 (1st Cir. 1995). First, a court must determine whether the proffered evidence has "special relevance"-in other words, whether it is relevant to any purpose other than to prove that a defendant has a propensity to commit a crime. *Id.* If the court finds a special relevance for the evidence, it must then evaluate it under Federal Rule of Evidence 403 to determine whether the probative value of the evidence is substantially outweighed by its danger of unfair prejudice. *Id.*

We first note that appellant's brief does not make clear which items of evidence he claims were erroneously admitted in violation of Rule 404(b). Nonetheless, even giving him the benefit of the doubt by assuming that he

objects on Rule 404(b) grounds to all of the evidence of his stalking and abuse of the victim, we find no plain error. In pretrial motions, the government set forth how it planned to use the evidence. Citing supporting case law from other circuits, it claimed that the evidence was not excluded by Rule 404(b) because it was "inextricably intertwined" with the crime charged and was necessary to provide coherence to its case. That rationale was apt.

As we note in our sufficiency of the evidence discussion, see infra part III, the government has the particular burden in carjacking cases to prove that a defendant acted with intent to cause death or serious bodily harm to the victim at the moment of the carjacking. See 18 U.S.C. § 2119. This is true here despite appellant's argument that his principle defense "was that Colon misidentified him as the man she saw struggling with Yesenia and that he was elsewhere at the time of her disappearance-not that he did the acts alleged but did them with innocent intent." See *United States v. Lynn,* 856 F.2d 430, 436 n. 15 (1st Cir.1988) ("This circuit has maintained that intent is in issue when it is an element of the crime charged, regardless of the defense presented.").

The evidence of appellant's intentional physical harm of the victim in the past had "special relevance," *Aguilar-Aranceta,* 58 F.3d at 798, because it was probative of his intent to cause her harm at the time he seized her car. As we note in discussing other issues in this case, appellant was seen inside the victim's car, striking her, immediately before her disappearance. Although this evidence alone might arguably suffice to establish the defendant's intent to cause the death of the victim at the time of the carjacking, we see no reason why the government should have been precluded from introducing some evidence of the defendant's prior abuse of the victim for the purpose of further illuminating his intent to cause her death or serious

bodily harm at the time of the carjacking. Indeed, at closing argument, the defendant argued to the jury that the government had not proven the elements of the crime, including the intent element, and appellant now challenges on appeal the sufficiency of *65 the evidence on the intent element specifically.

Furthermore, the evidence of appellant's stalking had special relevance because it demonstrated appellant's motive to commit the crime-his intense jealousy. Given appellant's claim that he was innocent of causing the victim's disappearance and death, the government was entitled to establish that motive to commit the crime. Evidence of appellant's stalking revealed that he was obsessed with the victim's whereabouts and activities. At one point, he placed a tape recorder in her car without her knowledge. Listening to her private conversations, he became convinced she was having an affair. According to the government's theory, the jealousy aroused by that knowledge led appellant to kill the victim. Indeed, he had previously stated to one of her friends that he was capable of killing her if he believed she were with another man.

Finally, the government used the evidence of stalking to argue that appellant was able to intercept the victim's car on a deserted road on April 15, 1999, because his constant surveillance allowed him to easily locate her. Therefore, the evidence of stalking also had the special relevance of demonstrating appellant's means to commit the crime.

Given the special relevance of appellant's physical abuse of the victim to his intent to cause her serious bodily harm or death at the time of the carjacking, and given the special relevance of the stalking to the appellant's motive and means to commit the crime, there was no error in the admission of the prior act evidence. Moreover, even if there was such an error, we must remember that we are dealing here with a claim of plain error, which requires us to find

both prejudice and serious impairment of "the fairness, integrity, or public reputation of the judicial proceedings" to warrant reversal. *United States v. Ziskind,* 491 F.3d 10, 14 (1st Cir. 2007). In that regard, we note all of the evidence relating to appellant's threats to do physical harm to the victim, which included: his statement to the victim's friend that he was capable of killing the victim if he believed she was with another man, his statement to the victim that "I am macho, and you have to respect me," made while choking the victim and overheard by her mother, and his statement to her mother that "I know what I will do before they disarm me," made upon learning about the protective order. In our view, those threats are not evidence of prior bad acts. They are more appropriately viewed as admissions by the defendant that he intended to do harm to the victim. In light of this evidence, we are confident that there was no plain error in the admission of evidence of prior abuse and stalking.

III.

Having determined which of the challenged evidence may be considered in evaluating appellant's sufficiency of the evidence challenge, we now reach the merits of that challenge. In so doing, we will ignore the statements we have deemed to have been erroneously admitted.

[11] Appellant claims that the district court erred in denying his Rule 29 motion for judgment of acquittal and claims that the evidence was insufficient to support his conviction. "[C]hallenges to the sufficiency of the evidence and to the denial of a the motion for judgment[ ] of acquittal raise a single issue," *United States v. Morillo,* 158 F.3d 18, 22 (1st Cir.1998) (quotation marks and citation omitted), which we review de novo. *United States v. Thompson,* 449 F.3d 267, 275 (1st Cir. 2006). We inquire

whether, taking the evidence in the light most favorable to the jury verdict, a *66 reasonable fact finder could have found the defendant guilty beyond a reasonable doubt. *Thompson,* 449 F.3d at 275. In other words, this court "must only satisfy itself that the guilty verdict finds support in a plausible rendition of the record." *United States v. Hatch,* 434 F.3d 1, 4 (1st Cir.2006) (quotation marks and citation omitted). A sufficiency claim therefore presents "daunting hurdles" for a defendant to overcome. *Id.* (quotation marks and citation omitted).

[12][13] Appellant claims that his conviction must be overturned because the government failed to prove that he acted with intent to cause death or serious bodily harm to the victim at the moment of the carjacking. The carjacking statute under which he was convicted, 18 U.S.C. § 2119, reads:

Whoever, with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall ... (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both, or sentenced to death.

We said in *United States v. Garcia-Alvarez*, 541 F.3d 8, 16 (1st Cir. 2008), that "the element of intent must be established at the time the defendant takes control of the motor vehicle." The judge instructed the jury to apply the standard of *Garcia-Alvarez,*FN8 telling them to find appellant guilty only if the government met its burden to prove, inter alia, that "the defendant intended to cause the death of Yesenia when he took the motor vehicle." Given this instruction, the question for us is whether the evidence

permitted a reasonable jury to find the requisite intent beyond a reasonable doubt.

FN8. The court's instruction on the elements of the charged crime was:

Now in order for the defendant to be found guilty of that offense, which I just read to you, the government has to prove each of the following elements beyond a reasonable doubt:

First, that the defendant took a motor vehicle from the person of Yesenia. Second, that the defendant did so by force and violence. Third, that the motor vehicle previously had been transported, shipped, or received in interstate commerce. [Fourth,] [t]hat the defendant intended to cause the death of Yesenia when he took the motor vehicle. And last, that as a result-that death resulted from the commission of the offense.

In closing argument, the government argued to the jury that it should find the defendant guilty if it found, inter alia, that "the defendant had the intent to murder Yesenia when he took the car."

The evidence easily supports that conclusion. First, eyewitness Diana Colón-Laboy ("Colón") recounted seeing appellant sitting in the passenger seat of the victim's car shortly before her disappearance. The car was pulled to the side of the road and the passenger door was open. Colón observed appellant striking the victim, and heard the victim say "leave me alone." One of the passengers in Colón's car, Sidia Lebrón-Gonzales ("Lebrón") testified that she heard Colón identify the victim and appellant, both of whom Colón knew personally, as they drove by. This episode, in which appellant was seen inside the victim's car, striking

her, was the last time the victim was seen. Hours later, her car was intentionally set ablaze in an abandoned field.

In addition to this eyewitness evidence, there was also the copious evidence of appellant's prior threats and physical assaults against the victim, from which a reasonable jury could conclude that appellant had the intent to seriously harm or *67 kill Ortiz when he took control of her vehicle. For example, witnesses testified about appellant's claims that he was capable of killing Ortiz if he believed she was with another man, and the evidence showed that at the time of her disappearance he believed that she was dating another man. There was also evidence that appellant had choked the victim while yelling "I am macho, and you have to respect me," and that he had once hit her so forcefully that she fell backward into a parked car. Furthermore, the victim's mother testified that appellant threatened that "he knew what he would do before they disarmed him" after the victim received the protective order. Finally, the evidence also showed that appellant stalked the victim up until the night of her disappearance and was obsessed with her location and activities. For example, after the couple's separation, appellant constantly phoned the victim's parents' home to ask where she was, often speaking in an angry and demanding manner. Appellant also followed the victim and her friends during their lunch hour, and, at one point, secretly placed a tape recorder under the seat of her car so that he could record her conversations.

And then there are appellant's damning admissions after the victim's disappearance that linked him to her murder. On April 21, 1999, appellant admitted to colleagues in the Puerto Rico police that he had been "upset and angry" with the victim and a man with whom he believed she was having an affair. On April 24th, appearing nervous and worried, he asked Sergeant Digno Cartagena-Colón what

would happen if the victim were found wearing his sweater. On June 16th, when Sergeant Daniel Colón-Díaz, a longtime friend and colleague of appellant's father, told appellant that there was enough evidence to file charges against him and also against his younger brother, appellant responded that he had acted alone and that his brother had not been involved. When Colón-Díaz promised not to involve the press if appellant would tell the police what had happened to the victim and take them to her body, appellant responded by promising to tell him "everything related to Yesenia's case" the next day. After that conversation, former Puerto Rico Police Commander Jovito Miró-Alvarado also spoke with appellant and encouraged him to confess immediately. Appellant refused, saying that he wanted his family to learn what had happened first because he lived in a small town and it would create a scandal, but promised to take them to the body after speaking to his family. When Miró asked appellant whether he was sorry "for what he had done to Yesenia," appellant responded that he was sorry. Miró then told appellant that there was a helicopter waiting to take them to the body, but appellant responded that a helicopter would not be necessary to reach it. FN9

FN9. After this conversation, appellant spoke to his father and aunt alone. Appellant's aunt called a lawyer, who also arrived and spoke with appellant. After speaking with his family and his lawyer, appellant made no more incriminating statements.

From this evidence, a reasonable jury could conclude that appellant had the intent to kill or seriously harm the victim when he took control of her car on the night of April 15, 1999. We therefore reject his challenges to the district court's denial of his Rule 29 motion for acquittal and to the

sufficiency of the evidence proving that he had the requisite intent to commit a carjacking.

IV.

We now address various challenges brought by appellant that would, if successful, result in a new trial.

*68 A. Restrictions on Impeachment

Appellant argues that the district court erred by restricting the introduction of evidence that he claims would have impeached the victim's statements about his stalking and abuse.

1. The Recorded Conversations

[14] Appellant argues that the district court erred in excluding from evidence tape recordings of the victim talking to passengers in her vehicle and on her cellular telephone while she was driving. The recordings were made by appellant months before her disappearance, by surreptitiously placing a tape recorder under the driver's seat of the victim's car. During direct examination of appellant, his counsel sought to play the recordings to the jury for the purpose of impeaching the hearsay statements of the victim, entered through government witnesses, that described appellant's abuse. This is the hearsay testimony that the government has acknowledged was wrongly admitted.

When a hearsay statement has been admitted under Rule 802, Rule 806 allows a party to attack the credibility of the hearsay statement "by any evidence which would be admissible for those purposes if [the] declarant had testified as a witness." Fed.R.Evid. 806. Appellant theorizes that the

tapes impeached the victim's accusations of abuse not because of what she actually said on the tapes, but because of how she said it. According to him, her tone and attitude as reflected on the tapes "corroborated the fact that she was having an affair and was not, in fact, afraid of Berríos." FN10 At trial, counsel for appellant argued:

FN10. We fail to see how the victim's alleged "affair" during this time would impeach her statements about appellant's abuse.

Yesenia in those tapes is very calm. She's very cool. She is joking, she is laughing. She says that, well, he might kill me; go ahead. She doesn't sound afraid at all. She never says that I have been hit, abused. In fact, it says that when that mother fucker, if he knew ... who the ties were for,FN11 he would kill me-but she's laughing.

FN11. Evidence at trial showed that appellant searched Ortiz's car while it was parked at her office in February 1999 and was upset to find men's ties, which he believed were a gift for another man.

The district court prohibited appellant from entering the tapes, but based its rejection of the evidence on a misreading of the Rules of Evidence. The court first ruled that the tapes could not be used under Rule 806 to impeach the victim's allegations because she was not a "declarant," stating that "[t]he definition of declarant under the rules of evidence specifically 801, is a person who takes the witness stand." In fact, the Rules of Evidence define "declarant" as "a person who makes a statement." Fed.R.Evid. 801(b). The court later stated that the evidence was inadmissible to impeach the victim under Rule 806 because the statements appellant sought to impeach were not hearsay but rather

"exceptions to hearsay." This was also mistaken; the admitted statements were hearsay even if, as the court ruled, the statements were excepted under Rule 803 from Rule 802's prohibition against hearsay. They thus were appropriate subjects for impeachment under Rule 806.

However, despite the mistaken logic for excluding the tapes, there was no error in their exclusion, and we are " 'not wedded to the lower court's rationale, but, rather, may affirm its order on any independent ground made manifest by the record.' " *69 *United States v. Shinderman*, 515 F.3d 5, 12 (1st Cir.2008) (quoting *InterGen N.V. v. Grina*, 344 F.3d 134, 141 (1st Cir. 2003)). Here, the tapes were inadmissible as impeachment evidence because their contents did not contradict the statements appellant sought to impeach. *See United States v. Hale*, 422 U.S. 171, 176, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975)("A basic rule of evidence provides that prior inconsistent statements may be used to impeach the credibility of a witness. As a preliminary matter, however, the court must be persuaded that the statements are indeed inconsistent."); *United States v. Zaccaria*, 240 F.3d 75, 79 (1st Cir. 2001); see also *United States v. Finley*, 934 F.2d 837, 839 (7th Cir.1991) ("Rule 806 extends the privilege of impeaching the declarant of a hearsay statement but does not obliterate the rules of evidence that govern how impeachment is to proceed.").

The tapes, which were transcribed by the FBI shortly before trial, recorded the victim discussing appellant's abuse and stalking. For example, she discussed on the tapes how appellant had searched her car at least two times while it was parked and how he often followed her car. The following exchange between the victim and her sister Yessica, who was riding in the victim's car, was recorded on the tapes:

Yesenia Ortiz-Acosta (YOA): Everybody feels sorry for Sammy, but nobody feels sorry for me ... what bothers me the most is that he wants to appear as the victim.

Jessica Ortiz-Acosta (JOA): But, Yesenia, what I'm saying is ... What we are afraid of, too is that he'll try to do something to you.

YOA: Well, Jessica, let him do it. Let him do it.

JOA: Or the baby girl.

YOA: He's not going to do anything to the baby girl.

JOA: Yes, but, to you?

YOA: And, let him do it. What am I going to do?

JOA: And if he kills you or something?

YOA: Let him kill me....

JOA: But do you think he is capable of that?

YOA: Oh, Jessica ... Well, I don't know Jessica, I don't know.

This is just one of the interchanges caught on tape that corroborate the government's case against appellant. Far from impeaching the victim's alleged statements of abuse, the tapes tell the story of a young woman plagued by a possessive, stalking husband. Although we have only read the transcripts of the tapes and acknowledge that appellant's argument relies on the declarant's tone of voice, appellant

cannot avoid the fact that the contents of the tapes, rather than contradicting Ortiz's allegations of abuse, strongly corroborate those allegations. Rather than proving, as appellant asserts, that the victim "was not, in fact, afraid of Berríos," the tapes record the victim stating that "deep inside, I am a little scared of [Berríos]." In sum, we agree with the government that "Ortiz-Acosta's hearsay statements indicated that Rodríguez-Berríos had abused and stalked her; Ortiz-Acosta said nothing on the tapes even suggesting that Rodríguez-Berríos did not do so." Because the recordings do not contradict the victim's hearsay allegations of abuse, there was no error in the district court's exclusion of the tapes.FN12

FN12. The government argues that there are other reasons for excluding the tapes, citing the rule against impeachment on a collateral matter through extrinsic evidence and, in light of the fact that there is no question that the recordings were made illegally, the federal statute prohibiting use of illegally made recordings in legal proceedings. See 18 U.S.C. §§ 2511, 2515. Because we have determined that the tapes did not contain prior inconsistent statements, however, we need not address these alternative grounds for exclusion.

*70 2. Ortiz's Relationship with a District Attorney

[15] Appellant also argues that the district court abused its discretion in sustaining government objections to questions asked on cross-examination of the victim's mother and her co-worker about the victim's alleged affair with a district attorney. Appellant argues that he should have been allowed to introduce evidence that "Yesenia's affair was with Serrano in particular to impeach the inference sought by the government from the fact that a

domestic violence complaint had been filed against him, i.e., to infer that the complaint was only filed because of Serrano's influence in the District Attorney's Office." This inference is so insubstantial that the district court was well justified in excluding the evidence. Moreover, appellant's desired in-depth inquiry into the victim's alleged affair with a district attorney would not meet the strictures of Rule 403 because of its high potential for prejudice compared to its low probative value. We therefore find no abuse of discretion in the district court's refusal to allow this inquiry, which could reasonably be seen as merely an attempt to impugn the character of the victim.

B. Exclusion of an Expert Witness on Eyewitness Identification

[16][17] Appellant argues that the district court erred in refusing to allow him to present testimony from an expert witness regarding the reliability of eyewitness identification. We review a decision to exclude expert testimony for abuse of discretion, *United States v. Diaz*, 300 F.3d 66, 74 (1st Cir. 2002); we are deferential toward a district court's decision, *United States v. Corey*, 207 F.3d 84, 88 (1st Cir. 2000).

Appellant sought to introduce expert testimony on the factors influencing the perception and memory of the government's eyewitnesses, Colón and Lebrón. Colón testified that she had seen appellant sitting in the victim's car, striking the victim, shortly before the victim's disappearance. At around 7:45 p.m. on April 15, 1999, Colón was driving with two friends from Guayama's town center toward a restaurant in Guayama's Branderi Ward. As she approached Branderi, Colón was forced to stop her car because two vehicles blocked the road. On the right side of the road, blocking her way, was a green Hyundai, similar to

appellant's car, and on the left was a champagne-colored Toyota, similar to the victim's car. Colón flashed her high beams and the green Hyundai sped away. Colón then moved forward slowly. As she passed the champagne Toyota, she saw that its passenger door was open and the interior light was on. She saw the victim sitting in the driver's seat of the vehicle and appellant in the passenger seat. Colón knew the victim because her husband worked with the victim's father, Ánibal Ortiz-Rodríguez, and she knew appellant because of his marriage to the victim. As they passed the car, Lebrón, who was a passenger in the car, heard Colón say, "Those are Ánibal's daughter and son-in-law." Colón testified that as she drove by the Toyota she heard the victim say, "leave me alone, leave me alone," and saw appellant striking her. As Colón continued to pass the car, appellant stopped hitting the victim and made eye contact with her. Colón testified that she did not stop driving because it was dark. As they approached the restaurant and the area grew lighter and more populated, one of Colón's passengers called 911. Apparently,*71 the passenger got a busy signal and did not retry.FN13

FN13. Lebrón gave testimony about the incident that was consistent with Colón's testimony. However, although she saw a man and woman in the car and heard "loud voices," she said did not hear what they were saying or see what was happening in the car.

In a pretrial motion, appellant sought the court's permission to retain Dr. Geoffrey R. Loftus, a professor of psychology and a specialist in perception and memory, as an expert witness.FN14 Appellant proffered that Dr. Loftus would testify about the factors influencing Colón and Lebrón's perceptions and memories of the night of April 15, 1999. In a written opinion, the district court denied the motion to

retain Dr. Loftus and ruled his testimony inadmissible. *United States v. Rodriguez-Berrios*, 445 F.Supp.2d 190 (D.P.R.2006).

FN14. Appellant was represented by court-appointed counsel pursuant to the Criminal Justice Act. See 18 U.S.C. § 3006A. The request was for the court to pay for the services of the expert witness, also pursuant to that act. 18 U.S.C. § 3006A(e).

[18] Although appellant urges us to adopt a rule that would categorically allow expert testimony on the flaws inherent in eyewitness identification, FN15 we have consistently maintained that the admission of such testimony is a matter of case-by-case discretion and have refused to adopt such a blanket rule for its admission or exclusion. *United States v. Stokes,* 388 F.3d 21, 27 (1st Cir. 2004), vacated on other grounds 544 U.S. 917, 125 S.Ct. 1678, 161 L.Ed.2d 471 (2005)(summarily vacating in light of *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)); *United States v. Brien,* 59 F.3d 274, 277 (1st Cir. 1995). We adhere to that position. While such testimony will sometimes comply with the strictures of Federal Rule of Evidence 702 (the rule that governs expert testimony) because it "will assist the trier of fact to understand the evidence or to determine a fact in issue," Fed.R.Evid. 702, other times it will not. See Brien, 59 F.3d at 276-77. In order to assist district courts faced with deciding whether to admit such expert testimony, we have suggested factors that influence its usefulness under Rule 702, such as "the reliability and helpfulness of the proposed expert testimony, the importance and the quality of the eyewitness evidence it addresses, and any threat of confusion, misleading of the jury, or unnecessary delay." Id. at 277.

FN15. Appellant cites an increasing body of academic literature concerning the reliability of eyewitness testimony. See, e.g., Richard A. Wise, Kirsten A. Dauphinais & Martin A. Safer, A Tripartite Solution to Eyewitness Error, 97 J.Crim. L. & Criminology 807 (2007); Jennifer L. Devenport, Steven D. Penrod & Brian L. Cutler, Eyewitness Identification Evidence, 3 Psychol. Pub. Pol'y, & Law 338, 338 (1997).

The district court in this case carefully considered the factors that we have set forth as relevant to the issue of whether to admit expert witnesses on eyewitness identification. Rodriguez-Berrios, 445 F.Supp.2d at 192-95. It first examined the importance of the eyewitness evidence that Dr. Loftus sought to address. Id. at 193. While it acknowledged that the eyewitness account was an important part of the government's case, the government did not rely solely on that testimony. Other important evidence included the defendant's incriminating statements before and after the disappearance, and the evidence of his stalking, threats, and physical abuse of the victim.

Quoting the Advisory Committee note accompanying Rule 702, the district court noted that:

*72 There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having specialized understanding of the subject involved in the dispute.

Id. at 192 (quoting Fed.R.Evid. 702 advisory committee's notes). The district court explained that Dr. Loftus had identified three perception-memory issues relevant to the case: 1) the accuracy of Colón's original perception of the two people in the vehicle, 2) the accuracy of Colón's memory of having verbally identified the vehicle's occupants, and 3) the accuracy of Lebrón's memory that Colón identified the individuals in the car. Id. at 193. According to the proffered report, Dr. Loftus would analyze these three issues in relation to factors such as "general lighting conditions, the consequences of illumination from a car's interior light, the eyewitness' possible lack of attention, and post-event information," and testify that any confidence displayed by Colón and Lebrón "should not, contrary to common sense, be construed as a reflection of the accuracy of their memories." Id. (quoting report of Dr. Loftus).

The district court observed that these factors-lighting, lack of attention, and post-event information-are particularly susceptible to exposure through cross-examination without the benefit of expert testimony. It therefore found that an expert witness on eyewitness testimony would be less helpful in this case, unlike a situation in which "an identification was made after a long delay or under conditions of extreme stress," id. at 194 (citing *United States v. Harris,* 995 F.2d 532, 535 (4th Cir.1993)), or when the witness's faculties were impaired at the time of the event, id. (citing *State v. Whaley*, 305 S.C. 138, 406 S.E.2d 369 (1991)). The court concluded that Dr. Loftus's testimony was not relevant "'in the incremental sense that ..., if admitted, [it] likely would assist the trier of fact to understand or determine a fact in issue.'" Id. (quoting *Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 81 (1st Cir. 1998)). Instead, "Dr. Loftus' testimony in this case would involve little more than 'a

credibility determination within the ken of the ordinary judge and juror-unlike, say, DNA identification.'" *Id.* (quoting Brien, 59 F.3d at 276).

Finally, the district court concluded that Dr. Loftus's proffered testimony had the potential to be seriously misleading in light of jurors' possible tendency to give undue weight to expert testimony. The court wrote:

While often invaluable to the search for truth, these experts' testimony carr[ies] a great deal of inherent reliability, which jurors can often confuse for infallibility. In cases such as this one, where vigorous and competent cross-examination can adequately flesh out the possible effect of factors such as lighting, lack of attention, and post-event information on the eyewitness[es'] identifications without exposing the jury to this type of prejudice, expert testimony can, and should, be excluded.

Id. at 194. After this careful assessment of the relevant considerations, the district court concluded that the proffered expert testimony should be excluded. This ruling was not an abuse of discretion.FN16

FN16. Although appellant also alludes to an argument that the district court's ruling on Dr. Loftus violated his Sixth Amendment right to present a defense, he does not develop any argument that is distinct from his argument that the district court abused its discretion in refusing to authorize funds for the retention of an expert witness. Therefore, our abuse of discretion analysis resolves this undeveloped claim as well.

*73 C. Denial of Appellant's Motion for a Mistrial

[19] Appellant argues that he should have been granted a mistrial after a government witness inappropriately testified that appellant had been summoned to San Juan to take a polygraph test during the course of the investigation into the victim's disappearance. Defense counsel immediately objected to the testimony, requested a sidebar, and moved for a mistrial. The district court denied the motion for a mistrial. After sidebar, however, in the presence of the jury, the court granted appellant's request to strike the witness's reference to the polygraph test and admonished the witness, saying:

[Y]ou are to testify only what you're asked. I believe you had received some instructions from the assistant U.S. Attorney that you were not to go into certain matters-and you were about to go into those-and not to volunteer any information. If you do, I'm going to strike your whole testimony.

Also in the presence of the jury, the court admonished the government by stating, "I'm going to allow you again to talk to the witness, advise him properly as to what are the areas that you are asking him. If he volunteers any information, the government is going to be in trouble."

After these warnings, the court adjourned for the evening. In the morning it offered a curative instruction to the jury, reiterating its instruction at the beginning of the trial that the jurors were to disregard any testimony which had been ordered stricken. It then continued:

You should totally disregard the testimony provided yesterday ... about a polygraph test allegedly offered to the defendant.... This means that you cannot consider it in any way or fashion during your deliberations in this case ...

[20] To be sure, it is troubling that a polygraph test was mentioned in the presence of the jury. The defendant's concern about the potentially prejudicial effect of the mention of the polygraph is understandable. Polygraph results are rarely admissible at trial. See, e.g., *Devries v. St. Paul Fire and Marine Ins. Co.*, 716 F.2d 939, 944-45 (1st Cir.1983)(reserving the question "whether a per se prohibition against the use of lie detector tests is appropriate," but noting that "polygraph evidence has long been considered of dubious scientific value and hence has been deemed irrelevant by the federal courts.")(quotation marks and citation omitted); see also *United States v. Johnson,* 446 F.3d 272, 278 (2nd Cir. 2006); *United States v. Dotson,* 324 F.3d 256, 261 (4th Cir. 2003).

Nonetheless, we disagree that the brief mention of the possibility of a polygraph examination warranted a mistrial. First, although the government witness mentioned that the defendant was "summoned" to take a polygraph examination, he did not say whether appellant actually took the test or describe its results. Furthermore, the witness was immediately reprimanded in front of the jury and the testimony stricken. The next day, the jurors were given a lengthy curative instruction that reminded them of their duty to follow the judge's instructions to disregard the testimony. "Swiftness in judicial response is an important element in alleviating prejudice once the jury has been exposed to improper testimony," and "appellate courts inquiring into the effectiveness of a trial judge's curative instructions should start with a presumption that jurors will follow *74 a direct instruction to disregard matters improvidently brought before them." *United States v. Sepulveda,* 15 F.3d 1161, 1185 (1st Cir. 1993).

Given all of these considerations, we find no abuse of discretion in the district court's refusal to grant appellant's motion for a mistrial.

D. Harmlessness of Other Evidentiary Errors

[21] As discussed earlier, we have concluded that the district court erroneously admitted certain statements entered through the testimony of the victim's friend, Ramos, and her mother, Acosta. Specifically, we concluded that the following statements were inadmissible: the victim's identification of her bruises as having been caused by appellant; her statement that she was afraid of appellant; her statement that appellant was an "abuser"; her statement that appellant would throw their baby at her; and her statement that she could not "have lunch in peace." Because these statements should not have been admitted, we did not consider them as part of the body of evidence supporting appellant's conviction. Nevertheless, we must now consider whether the erroneous admission of the statements was harmless. If not-i.e., if appellant was prejudiced by the errors-appellant must be granted a new trial. FN17

FN17. The government accurately points out that appellant failed to object at trial to some of this evidence, such as the victim's statement that appellant was an "abuser" and sometimes threw their baby at her. While we normally review unpreserved objections under the plain error standard, United States v. Matos-Quinones, 456 F.3d 14, 20-21 (1st Cir.2006), for simplicity we will review all of the evidentiary errors under the more stringent (from the perspective of the government) harmless error standard. In this case, the outcome is the same.

[22] "'The essential inquiry in harmless error review is whether the improperly admitted evidence likely affected the outcome of the trial.'" *United States v. Dunbar*, 553 F.3d 48, 59 (1st Cir. 2009)(quoting *United States v. Tom*,

330 F.3d 83, 95 (1st Cir. 2003)). This inquiry is case-specific and includes "consideration of such factors as the 'centrality of the tainted evidence, its uniqueness, its prejudicial impact, the use to which evidence was put, and the relative strengths of the parties' cases.'" *United States v. Isler,* 429 F.3d 19, 26 (1st Cir 2005)(quoting *United States v. Garcia-Morales,* 382 F.3d 12, 17 (1st Cir.2004)).

The erroneously-admitted accusations were repetitious of other evidence of appellant's stalking, violent threats, and violence, and were, therefore, neither "unique" nor "central[ ]" to the government's proof of appellant's stalking and abuse. This other evidence included Acosta's eyewitness account of an incident in which appellant choked the victim in the hallway of her home while saying "I am macho, and you have to respect me," as well as testimony from appellant's former neighbor that months before the separation she saw appellant hit the victim so hard that the victim fell backwards into a parked car. Furthermore, evidence of appellant's stalking came in through the testimony of the victim's friends who regularly ate lunch with her and observed that appellant constantly monitored her, even up to the day of her disappearance, when he appeared during their lunch hour. There was also evidence that appellant would constantly telephone the victim's parents after the separation and inquire in a menacing manner about the victim's whereabouts; his admissions on these phone calls revealed he was tracking the victim closely. One time, he told the victim's*75 mother, "I'm going to give her a little time for her to return back with me. And if she doesn't come back with me, I know what I'm going to do."

Finally, the government's case included the admissions made by appellant in the months following the victim's disappearance, and the eyewitness testimony placing him in

the victim's car, abusing her, moments before her disappearance. In light of their lack of centrality to the government's case, their redundancy, and the relative strength of the government's case against appellant, we find that the erroneously-admitted statements were harmless.FN18

FN18. Appellant refers briefly, without any development, to a cumulative error argument. We deem this perfunctory argument waived. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.1990).

Affirmed.

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APPENDIX -- B

United States Court of Appeals
For the First Circuit

No. 07-1854

UNITED STATES

Appellee

v.

EDDIE S. RODRIGUEZ-BERRIOS, a/k/a Samir

Defendant - Appellant

Before
Lynch, Chief Judge,
Torruella, Boudin,
Lipez and Howard,
Circuit Judges.

ORDER OF COURT

Entered: September 15, 2009

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active

judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

/s/ Richard Cushing

Donovan, Clerk